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In The Supreme Court of the United States

A.A., A.B., A.C., A.D. (by M.M., his natural parent), A.E., A.F., and A.G. (all fictitious initials), individually and on behalf of all others similarly situated,

Petitioners,

v.

STATE OF NEW JERSEY; JON S. CORZINE, in his official capacity as Acting Governor, State of New Jersey; STUART RABNER, in his official capacity as Attorney General, State of New Jersey; and JOSEPH R. FUENTES, in his official capacity as Superintendent of the New Jersey State Police,

Respondents.

On Petition For A Writ Of Certiorari To The New Jersey Appellate Division

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Amendment to the New Jersey Constitution known as Paragraph 12, which immunized any New Jersey sex offender community notification statute from state law judicial review, "represents a per se violation of the equal protection clause because . . . it creates an unprecedented gap in the fabric of [the New Jersey] state constitution by depriving plaintiffs of all existing and potential legal protections." Pet. App. 36a (Fisher, J., concurring).

2. Whether Paragraph 12 also fails rational basis review under the equal protection clause because, among other reasons, New Jersey has no legitimate interest in immunizing legislation from judicial review by denying certain citizens legal rights that others continue to enjoy.

3. Whether Paragraph 12 imposes punishment, in violation of the *ex post facto* and double jeopardy clauses of the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners are a class comprised of thousands of adults and juveniles found to have committed a sex offense and who are subject to Article IV, section 7, paragraph 12 of the New Jersey Constitution.

Respondents are the State of New Jersey, Jon S. Corzine, in his official capacity as Governor, State of New Jersey, Stuart Rabner, in his official capacity as Attorney General, State of New Jersey, and Joseph R. Fuentes, in his official capacity as Superintendent of the New Jersey State Police.

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OPINIONS BELOW

The order of the New Jersey Supreme Court denying Petitioners' petition for certification is reported at 188 N.J. 346, 907 A.2d 1007 and reprinted at Pet. App. 57. The opinion of the New Jersey Superior Court, Appellate Division, is reported at 384 N.J. Super. 481, 895 A.2d 453, and is reprinted at Pet. App. 1. The order and opinion of the New Jersey Superior Court, Law Division, is reprinted at Pet. App. 39.

JURISDICTION

The New Jersey Supreme Court entered its order on September 8, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment, as well as the *ex post facto* and double jeopardy clauses of the United States Constitution. The state provision at issue is Article IV, section 7, paragraph 12 of the New Jersey Constitution, which is set forth in its entirety below.

STATEMENT OF THE CASE

This case involves an amendment to the New Jersey Constitution – "Paragraph 12" – which declares that persons found to have committed a sex offense have no

ability to challenge on state law grounds any community notification law enacted by the New Jersey Legislature. The effect of Paragraph 12 is to deny the persons who fall within its scope any opportunity to rely upon state law rights – *e.g.*, due process, privacy – that all others continue to enjoy.

New Jersey's initial registration and notification law was a response to the murder of seven-year-old Megan Kanka on July 29, 1994. The day after Megan disappeared, a paroled sex offender who lived across the street, Jesse Timmendequas, confessed to her sexual assault and murder. Timmendequas was convicted of the crime and is currently on death row. *State v. Timmendequas*, 161 N.J. 515, 536-44, 737 A.2d 55, 65-70 (1999).

Public reaction to the murder was intense. Three thousand signatures were presented to the New Jersey Legislature on a petition demanding action, and within two weeks of the crime, bills providing for registration and community notification of sex offenders had been introduced in the New Jersey General Assembly. This legislation was premised on the belief that convicted sex offenders are uncontrollable recidivists, and on the untested assumption that notifying the community of their whereabouts would help to reduce that recidivism. However, these assumptions were given little scrutiny – the legislation passed under emergency suspension of the rules, there were no hearings in the New Jersey Assembly, and only the briefest of hearings in the New Jersey Senate. By October 20, a package of bills was approved by the Legislature and Governor Whitman signed them into law on October 31, 1994, just three months after the murder. *See E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997).

Among the new laws was a broad registration and community notification provision, N.J.S.A. 2C:7-1, *et seq.* The registration aspect of the statute requires that "repetitive, compulsive" sex offenders register every ninety days; all other sex offenders must register annually. The extent of community notification for a given registrant depends on their determined risk of reoffense. For high risk ("Tier 3") registrants, notices are distributed to private residences, businesses, schools and community organizations in the area(s) where the offender lives and works. For moderate risk ("Tier 2") registrants, notices are provided to schools and community organizations. Notification concerning low risk ("Tier 1") offenders is provided only to law enforcement. N.J.S.A. 2C:7-8(c). The statute is very broad in terms of the offenders who are subject to its requirements. N.J.S.A. 2C:7-2.

In *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995), the New Jersey Supreme Court addressed a number of constitutional challenges to the new statute. The Court upheld the law, but only after reading into the statute and the guidelines promulgated by the Attorney General for its implementation certain procedural protections designed to prevent any "excessiveness of community notification." *Id.* at 29, 662 A.2d at 381. As a basis for these limitations, the *Doe v. Poritz* Court concluded that under the New Jersey Constitution the offenders subject to the law had protected privacy interests in their home addresses, and in the compilation of information included in the Internet Registry. *Id.* at 84-87, 106, 662 A.2d at 409-412, 420. According to the Court, "a privacy interest is implicated when the government assembles . . . diverse pieces of information into a single package and disseminates that package to the public, thereby ensuring that a person cannot assume

anonymity – in this case, preventing a person's criminal history from fading into obscurity and being wholly forgotten." *Id.* at 84-87, 662 A.2d at 409-11. The Court further indicated that "even if the governmental purpose is legitimate and substantial . . . the invasion of the fundamental right of privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose." *Id.* at 90, 662 A.2d at 412 (quoting *In re Martin*, 90 N.J. 295, 318, 447 A.2d 1290, 1302 (1982)).

Reacting to *Doe v. Poritz* and a number of other court decisions which reaffirmed, at least to some degree, the constitutional rights of sex offenders, on November 7, 2000, the voters approved an amendment to the State constitution in an effort to abolish those rights. Pet. App. 27 (4/6/06 App. Div. opinion (Fisher, J., concurring) at n. 7). That amendment, which now constitutes Article IV, section 7, paragraph 12 of the New Jersey Constitution of 1947 ("Paragraph 12" or "the Amendment"), provides that:

> Notwithstanding any other provision of this Constitution and irrespective of any right or interest in maintaining confidentiality, it shall be lawful for the Legislature to authorize by law the disclosure to the general public of information pertaining to the identity, specific and general whereabouts, physical characteristics and criminal history of persons found to have committed a sex offense. [N.J. Const. of 1947, Art. IV, § 7, ¶ 12.]

The Amendment does not, by its terms, create a scheme for public disclosure of the personal information it describes. Rather, the Amendment insulates any such laws from judicial review by stripping sex offenders of *any* state

law rights, constitutional or other, that the new laws might infringe.

With Paragraph 12 in place, on July 23, 2001, New Jersey then enacted a new, broader sex offender notification law – The Internet Registry Act ("the Act"), Public Law 2001, Chapter 167, codified at N.J.S.A. 2C:7-12 *et seq.* The Act authorized the creation of a central sex offender Registry. Contrary to the requirements of *Doe v. Poritz*, the Act dispensed with narrow restrictions on the scope of community notification and required world-wide notification via the Internet.

A class action challenging the Act (and Paragraph 12) was filed in federal court. On an appeal from an order granting, in part, a preliminary injunction, the Third Circuit Court of Appeals rejected the plaintiffs' federal law challenges to the Act and remanded the matter for consideration of plaintiffs' remaining claims. *A.A. v. New Jersey*, 341 F.3d 206 (3d Cir. 2003). Subsequent to the Third Circuit's ruling, the parties filed motions for summary judgment on the claims that had not been disposed of in the appeal from the preliminary injunction – *i.e.*, the plaintiffs' claims that Paragraph 12 violates the United States Constitution, and their claims that the Internet Registry Act violates the New Jersey Constitution. At oral argument, the district court expressed the view that those claims should be adjudicated in state, rather than federal, court. Consequently, the plaintiffs requested a voluntary dismissal, without prejudice, of those claims. By Order dated November 7, 2003, the district court granted plaintiffs' request. At no time were the claims that are at issue in the case at bar ruled upon in the prior federal court action.

Petitioners filed the Complaint instituting this action on January 2, 2004. In March 2004, Respondents moved to dismiss the action and Petitioners moved for summary judgment in their favor. In support of their motion, Petitioners presented the trial court with extensive evidence of the devastating impact of community notification on Petitioners over the prior decade. That evidence included fifty-five certifications obtained after the Internet Registry became operational, demonstrating the harmful effects of Internet notification.[1] Many of the offenders who described harassment, loss of housing and employment and other problems following Internet notification indicated that they were not experiencing these problems, or not to the same degree, under the pre-Internet notification system.

By Order filed August 30, 2004, the trial court granted Petitioners' application for class certification and for a sealing Order. By a written opinion and an Order both dated December 20, 2004, the trial court granted Respondents' motion to dismiss and denied Petitioners' motion for summary judgment. Pet. App. 39.

By Opinion dated April 6, 2006, the Superior Court, Appellate Division, affirmed the trial court's decision. Pet.

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[1] The dangers of Internet notification have been highlighted by recent vigilante executions of sex offenders in other states. In August 2005, a man who reportedly had been molested as a child used Oregon's Internet registry to track down and execute two sex offenders. The Associated Press, *Murder suspect was victim himself*, The Olympian, Sept. 10, 2005 (available at http://www.theolympian.com/apps/pbcs.dll/article?AID=/20050910/NEWS06/509100354). In April 2006, two Maine sex offenders were executed by a man who used that state's Internet registry to obtain their addresses. Glen Adams, *Cops: Sex offenders' killer found names on state site*, Chicago Sun-Times, April 18, 2006 (available at http://www.suntimes.com/output/news/cst-nws-sex18.html).

App. 1. The majority opinion rejected Petitioners' challenges to Paragraph 12, while expressing doubt that the Internet Registry Act would withstand a challenge under the New Jersey Constitution without Paragraph 12 in place. Pet. App. 23.

In a concurring opinion, Judge Fisher disagreed with the majority opinion's view of the constitutionality of Paragraph 12. Finding Paragraph 12 similar in many respects to a Colorado constitutional amendment struck down on equal protection grounds in *Romer v. Evans*, 517 U.S. 620 (1996), Judge Fisher concluded that "Paragraph 12 represents a glaring violation of the equal protection clause." Pet. App. 36. Nevertheless, he voted to affirm based upon the conclusion that even without Paragraph 12 the Internet Registry Act would not run afoul of state law.

By Order entered September 8, 2006, the New Jersey Supreme Court denied Petitioners' Petition for Certification and dismissed their Notice of Appeal. Pet. App. 57.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to remedy a flagrant violation of Petitioners' rights under the Federal Constitution. As demonstrated below, the Appellate Division's majority opinion conflicts with this Court's pronouncements regarding equal protection in *Romer v. Evans*, 517 U.S. 620 (1996), and with the decisions of this Court which recognize that rights-stripping measures such as Paragraph 12 should be deemed punishment for purposes of the *ex post facto* and double jeopardy clauses of the United States Constitution.

Aside from its obvious importance to Petitioners, granting the petition would provide an opportunity for the Court to elucidate and reassert federal constitutional restrictions on state constitutional amendments of this type. The approach Paragraph 12 embodies represents a significant threat to the core meaning of equal protection, and to judicial review itself. Under this approach, states may avoid constitutional challenges to popular legislation simply by amending their state constitutions to redefine – or, in this case, extinguish – the legal rights that those who are subject to the laws might rely upon in their challenges. This case provides the opportunity to make clear that any issue-specific tinkering with state constitutions must be mindful of the equal protection rights of those impacted by the amendments, and that an amendment which denies the persons regulated by a particular class of laws any opportunity to obtain state law judicial review constitutes an equal protection violation in the most literal sense. This case also presents the opportunity to announce that a state's undeniable authority to treat criminal offenders differently does not encompass the authority to declare those offenders shall no longer have the right to have rights. Finally, the Petition should be granted so that the Court may address the question of whether a rights-stripping measure such as Paragraph 12 constitutes punishment for purposes of federal *ex post facto* and double jeopardy protections.

I. PARAGRAPH 12 VIOLATES EQUAL PROTECTION

A. Paragraph 12 Constitutes a *Per Se* Violation of Equal Protection

The Fourteenth Amendment of the United States Constitution provides that "No state shall . . . deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1. The equal protection clause "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). Paragraph 12 is unconstitutional because its express purpose is to single out a class of citizens for *unequal* protection of the law – *i.e.*, it is a *per se* violation of the equal protection clause.

In *Romer v. Evans*, 517 U.S. 620 (1996), this Court considered an equal protection challenge to a state constitutional amendment that is similar in kind to Paragraph 12. The provision at issue in *Romer* was an amendment to the Colorado Constitution ("Amendment 2") that prohibited the enactment or enforcement of any state law barring discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Colo. Const. Art. II, ¶ 30b.

Amendment 2 was initially challenged in state court. The Colorado Supreme Court concluded that the amendment violated the equal protection clause. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994). The court assessed Amendment 2 under the traditional analysis for equal protection claims, under which laws that burden a fundamental right or target a suspect class are subjected to "strict scrutiny," and all other laws need only bear a "rational relationship"

to some legitimate end. *Id.* at 1339. The court concluded that Amendment 2 burdened a fundamental right to participate equally in the political process and rejected the State's arguments that the Amendment was necessary to promote various "compelling" state interests. *Id.* at 1341-49.

This Court affirmed the Colorado Supreme Court, but took a different approach. The Court noted that Amendment 2's "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." *Romer*, 517 U.S. at 633; *see also id.* ("[i]t is not within our constitutional tradition to enact laws of this sort"). According to the Court, by adopting this approach – singling out a group of citizens for unequal access to legal protection – Amendment 2 constituted a *per se* violation of the equal protection clause:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. [*Id.*]

See also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("The guarantee of 'equal protection of the laws is a pledge of the protection of equal laws.'" (*quoting Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))). Thus, the *Romer*

Court struck down Amendment 2, concluding its opinion with the admonition that "[a] State cannot so deem a class of persons a stranger to its laws." *Id.* at 635.

Like Amendment 2, Paragraph 12 constitutes a *per se* violation of the equal protection clause. Paragraph 12 nullifies "any other provision" of the State Constitution, as well as "any right or interest in maintaining confidentiality," that may conflict with community notification legislation. N.J. Const. Art. 4, § 7, ¶ 12. Thus, with Paragraph 12 in place, Petitioners in this case are, as a class, accorded lesser rights to privacy, lesser rights to protection from *ex post facto* legislation, lesser rights to be treated fairly by their government – *i.e.*, due process. *But see Doe v. Poritz*, 142 N.J. at 99-109, 662 A.2d at 417-422 (sex offenders have state constitutional right to due process and fundamental fairness). Indeed, Paragraph 12 extinguishes *all* current and future state law rights – constitutional, statutory and common law – to the extent that Petitioners would conceivably seek to rely upon them to challenge a community notification law.

Consequently, in its current form, the New Jersey Constitution immunizes from legal challenge *any* notification scheme, no matter how draconian. For example, requiring that sex offenders be branded, or that they wear badges or armbands which identify them as such, would all be permissible under state law. And because Paragraph 12 abolishes any state right to due process, the State Constitution would, contrary to *Doe v. Poritz*, deny an offender any right to a hearing to make a case that the notification proposed by the State was irrational or unjustified.

No other category of citizens is denied these rights. No other category of persons is singled out for diminished protection under state law or, in particular, left so completely at the mercy of the New Jersey Legislature and Attorney General with respect to disclosure of their private information. Thus, like Amendment 2, Paragraph 12 singles out one category of persons – sex offenders – and declares that they are strangers to legal rights all other citizens continue to enjoy.

The wholesale stripping of sex offenders' rights under the New Jersey constitutional amendment is every bit as offensive to equal protection rights as was Colorado's constitutional amendment. As in *Romer*, the singled-out category of unpopular persons now has the burden of enlisting the state's citizens "to amend the State Constitution" as their only means of restoring their rights. *Romer*, 517 U.S. at 631. Indeed, Paragraph 12 is an even more brazen assault on equal protection, for while Amendment 2 arguably sought only to deny homosexuals "special rights," *id.* at 626, Paragraph 12 explicitly extinguishes *any* state-law right to challenge community notification.

The Appellate Division's majority opinion attempted to distinguish *Romer* by arguing that, unlike the gays and lesbians who were the subject of Amendment 2, the sex offenders who are subject to Paragraph 12 are being singled out on the basis of their conduct, and not their status. Pet. App. 19. This aspect of the court's decision rests upon a fundamental misunderstanding of the first part of the *Romer* holding.

In the first part of its holding in *Romer*, this Court concluded that Amendment 2 was "an invalid form of legislation" – one that singled out a group of citizens for

unequal legal protection. 517 U.S. at 632. The Court's conclusion that Amendment 2 constituted a literal violation of the equal protection clause was not dependent on the characteristics of the group affected by that measure, such as whether the group was defined purely by its status, was particularly vulnerable to discrimination, etc. When the Court stated, "[i]t is not within our constitutional tradition to enact laws of this sort," *id.* at 633, the "sort" of laws to which the Court was referring clearly was not laws penalizing gays and lesbians. Indeed, laws penalizing homosexual conduct have a long tradition. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled*, *Lawrence v. Texas*, 539 U.S. 558 (2003). Rather, the "sort" of laws the *Romer* Court had in mind are laws which declare that "in general it shall be more difficult for one group of citizens than for all others to seek aid from the government." 517 U.S. at 633.

Paragraph 12 is the same "sort" of law as Amendment 2. Both provisions are constitutional amendments – *i.e.*, measures that sought to reshape the legal status of the affected groups in the most fundamental way possible. Like Amendment 2, Paragraph 12 places its targeted group on unequal footing in terms of the group members' ability to obtain the protection of the law. For purposes of challenging community notification, each Petitioner is "a stranger to [New Jersey's] laws." *Id.* at 635.

In summary, as Judge Fisher concluded in his concurring opinion, Paragraph 12 "represents a per se violation of the equal protection clause because . . . it creates an unprecedented gap in the fabric of [the New Jersey] state constitution by depriving Petitioners of all existing and potential legal protections." Pet. App. 36. Paragraph 12 is a rare example of an instance in which the majority has

made a deliberate decision, enshrined in the organic law of the State, to deny to a selected disfavored group the legal protections all others enjoy. It thus constitutes an equal protection violation "in the most literal sense." *Romer*, 517 U.S. at 633; *see also Plyler v. Doe*, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."). Certiorari should be granted to remedy this fundamental violation of equal protection.

B. Paragraph 12 Fails a Rational Basis Review

Paragraph 12 not only defies normal rational basis review since it constitutes a *per se* Fourteenth Amendment violation, it also fails to survive traditional rational basis review. This constitutes an independent ground for Paragraph 12's invalidation.

As this Court explained in *Romer*, by requiring a classification to bear a rational relationship "to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." 517 U.S. at 633. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 634 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (alterations and emphasis in original)); *see also Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993) ("even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation.").

The *Romer* Court held that even under a rational basis review, the Colorado constitutional amendment violated the equal protection clause. For example, the Court rejected the assertion that the amendment was rationally related to Colorado's interest in promoting citizens' freedom of association and conserving resources to fight discrimination against other groups:

> The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. . . . [Amendment 2] is a status-based enactment. . . . it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . . " *Civil Rights Cases*, 109 U.S., at 24, 3 S. Ct., at 30. [*Id.* at 635.]

Other decisions of this Court have similarly declared laws unconstitutional under the rational basis test, based upon challenges asserting an animus against a class of people. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), for example, the Court held unconstitutional a city ordinance that required a special use permit only for group homes for mentally retarded and not for other institutions. The Court held that the lack of fit between the city's asserted interest and its action suggested that the real reason for its requirement was "irrational prejudice" against the mentally retarded, *id.* at 450, a "bias . . . [to which] the law cannot directly or indirectly, give . . . effect." *Id.* at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). Similarly, in *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court held unconstitutional a Food Stamp law that excluded households of unrelated members. The Court held that the lack of fit

between the exclusion and the asserted state interests suggested animus towards hippies. *Id.* at 534; *see also Louisville Gas & Electric Company v. Coleman*, 277 U.S. 32, 37-38 (1928) ("Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.") Under these precedents, application of the rational basis test demonstrates Paragraph 12's unconstitutionality.

Like Amendment 2, Paragraph 12 was "born of animosity toward the class of persons affected." *Id.* at 634. In the Megan's Law litigation preceding the adoption of Paragraph 12, the courts upheld the statute against constitutional attack, *Doe v. Poritz*, 142 N.J. 1 (1995); *Paul P. v. Verniero*, 170 F.3d 396 (3d Cir. 1999); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), but reaffirmed the principle that even sex offenders are "persons," entitled to constitutional protection. *See, e.g., Paul P. v. Farmer*, 80 F. Supp. 2d 320 (D.N.J. 2000) (holding that state guidelines for distribution of notification infringed on sex offenders' privacy rights), *aff'd*, 227 F.3d 98 (3d Cir. 2000). Paragraph 12 was a direct response to the latter aspect of those decisions. John P. McAlpin, "Mother's Lament: Kanka Berates Judicial System," *The Trentonian*, April 5, 2000 (discussing movement for constitutional amendment in response to "appalling" judicial decisions); Ovetta Wiggins, "Voters To Decide on Wide Publicity for Sex Offenders," *The Record*, November 1, 2002, at a17 ("Lawmakers, in turn, are asking voters on Election Day to amend the state constitution so they can pass laws they expect will circumvent some of the Megan's Law decisions handed down by the courts."); *see also* Pet. App. 26 (Fisher, J., concurring)

at n. 7.[2] Paragraph 12 says, in effect, that Petitioners are not worthy of constitutional protection.

Paragraph 12 is also similar to Amendment 2 in that it is "at once too narrow and too broad." *Romer*, 517 U.S. at 633. Paragraph 12 is irrationally broad in terms of the offenders to which it applies – all "persons found to have committed a sex offense." N.J. Const. of 1947, Art. IV, § 7, ¶ 12. This language apparently encompasses even minor offenses, such as municipal court convictions, and includes persons who have led law-abiding lives for decades. Paragraph 12 covers offenders who were young children or adolescents when they offended, and the disabilities it imposes continue until death. Even an offender who has become physically incapable of committing another offense remains subject to Paragraph 12.

Like Colorado's Amendment 2, Paragraph 12 is also too narrow. *Romer*, 517 U.S. at 633. There is no rational basis for singling out sex offenders for lesser constitutional protection, while preserving the constitutional rights of all others, including murderers and other undesirable people. If, for example, a convicted terrorist can rely on the New Jersey Constitution to prevent the State from including his home address on a "Terrorist Internet Registry," there is no rational basis for denying sex offenders any ability to seek similar relief.

Instead of recognizing the peculiar nature of Paragraph 12, the Appellate Division's majority opinion applied

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[2] This response is consistent with the intense public hostility towards Petitioners, as reflected in the voluminous record detailing the attacks, harassment and ostracism they have endured in the years since the original law was adopted in 1994.

the typical rational relationship test and upheld Paragraph 12 based upon a finding that it is rationally related to the state's interest in conducting community notification. Pet. App. 17, 21. The problem with this reasoning is that Paragraph 12 is not a notification law; it is a rights-stripping law. The state has no legitimate interest in denying Petitioners legal rights that remain available to all others. Moreover, the only community notification affected by Paragraph 12 is notification that, in the absence of Paragraph 12, would have violated Petitioners' state law rights. The state has no legitimate interest in conducting *unlawful* notification.

The state's undisputed power to treat Petitioners differently by virtue of the fact that they have engaged in criminal behavior does not encompass the authority to declare that they shall no longer have the right to have rights. A criminal conviction does not extinguish the offender's right to equal protection. *Johnson v. California*, 543 U.S. 499 (2005); *Williams v. Lane*, 851 F. 2d 867, 881 (7th Cir. 1988). Thus, the *Romer* Court correctly saw no need to distinguish the Court's prior decision in *Bowers*, which had upheld against constitutional attack a state statute *criminalizing* gay and lesbian conduct.

The Appellate Division majority failed to recognize this point and incorrectly analogized Paragraph 12 to felon disenfranchisement laws. Pet. App. 20-21. Provisions denying convicts the right to vote are specifically authorized by Section 2 of the Fourteenth Amendment and, thus, fall within a special exemption from the requirements of equal protection. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). Moreover, the Court's citation to cases upholding laws barring convicts from possessing firearms does not support the Court's holding. A finding that whatever

constitutional right there may be for private citizens to bear arms does not extend to convicted felons is categorically different from the conclusion that the state is free to forever bar a group of citizens from raising any constitutional challenge – on due process, privacy, or any other grounds – to an entire category of laws.

In summary, Paragraph 12 violates Petitioners' rights under the United States Constitution to the equal protection of laws because it is not rationally related to any legitimate state interest.

II. PARAGRAPH 12 VIOLATES *EX POST FACTO* AND DOUBLE JEOPARDY[3]

As noted above, Paragraph 12 is not a community notification law, it is a rights-stripping law. Consequently, although this Court rejected the argument that Alaska's sex offender registration and community notification law violates the *ex post facto* clause, *Smith v. Doe*, 538 U.S. 84 (2003), this case presents a very different question. As is discussed below, Paragraph 12 imposes punishment on persons who committed their offenses before that provision was enacted. It therefore violates Petitioners' rights

[3] The Appellate Division rejected without analysis Petitioners' *ex post facto* and double jeopardy challenge to Paragraph 12 on the mistaken belief that those arguments had previously been raised and rejected in the prior federal court litigation. Pet. App. 12. ("We reject plaintiffs' challenges to Paragraph 12 under the double jeopardy and ex post facto provisions of the Federal Constitution. In fact, the Third Circuit denied a preliminary injunction in this case based on those arguments. . . . "). The constitutionality of Paragraph 12 was not raised in the proceedings relating to the preliminary injunction, and no federal court has ever ruled on the constitutionality of Paragraph 12.

under the *ex post facto* and double jeopardy clauses of the United States Constitution.

Article I, Section 10 of the United States Constitution provides that "no state shall . . . pass any ex post facto law." U.S. Const. Art. I, § 10. Under the *ex post facto* clause, no state may apply a law that "inflicts a greater punishment than the law annexed to the crime when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). Similarly, the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offense to be put twice in jeopardy of life and limb." U.S. Const. amend. V. The Double Jeopardy Clause prohibits successive prosecutions for the same offense as well as multiple punishments for the same offense in successive proceedings. *Hudson v. United States*, 522 U.S. 93, 99 (1997). Because "punishment" has the same meaning for purposes of both constitutional provisions, the threshold determination for purposes of evaluating claims under both clauses is whether the challenged measure constitutes punishment. *See E.B.*, 119 F.3d at 1092.

In determining whether a statutory scheme imposes retroactive "punishment," a court first must look to the legislative intent. *Smith v. Doe*, 538 U.S. at 92. If the legislature indicated an intention that the measure be civil, then further inquiry is appropriate to determine whether the statutory scheme is "'so punitive either in purpose or effect'" that it should nevertheless be considered punitive. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1994)). Only the "clearest proof" of a punitive purpose or effect will suffice to override legislative intent and transform what has been denominated a civil remedy

into a criminal penalty. *Id.* (quoting *Hudson*, 522 U.S. at 100).

In analyzing the effects of the statute, the seven factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), provide a "useful framework." *Smith v. Doe*, 538 U.S. at 97. Those factors are:

> (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment – retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Hudson, 522 U.S. at 99 (quoting *Mendoza-Martinez*, 372 U.S. at 169). These factors are "neither exhaustive nor dispositive." *Id.* Consideration of the *Mendoza-Martinez* factors here establishes that Paragraph 12 is punitive.

A. Paragraph 12 Imposes an Affirmative Disability or Restraint

This factor considers "how the effects of the [provision] are felt by those subject to it." *Smith v. Doe*, 538 U.S. at 99-100. The effect of Paragraph 12 is that sex offenders have fewer rights than all other citizens and no rights whatsoever with respect to community notification. That is, under Paragraph 12, Petitioners are denied "the right to have rights"; for purposes of pursuing any state constitutional challenge to a public notification law, they are

effectively non-persons. This is clearly an affirmative disability and restraint. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (statutes divesting Americans of citizenship constituted criminal punishment). As Justice Blackmun put it in *Fedorenko v. United States*, 449 U.S. 490, 522-23 (1981) (Blackmun, J., concurring):

> citizenship has been described as "man's basic right for it is nothing less than the right to have rights," and the effects of its loss justly have been called "more serious than a taking of one's property, or the imposition of a fine or other penalty." (footnotes omitted).

Moreover, the disability imposed on Petitioners is particularly severe given the New Jersey Supreme Court's tradition of construing the New Jersey Constitution to afford greater protection of civil rights than afforded under parallel provisions of the federal constitution. *Right to Choose v. Byrne*, 91 N.J. 287, 333, 450 A.2d 925, 949 (1982). With Paragraph 12, sex offenders have *no* state constitutional rights where community notification is concerned. Thus, these persons will have no opportunity – in this case, or any future case, perhaps involving an even harsher notification law – to seek protection from the New Jersey Constitution. This leaves Petitioners vulnerable to the harsh effects of community notification, and constitutes a serious affirmative disability and restraint. Accordingly, Paragraph 12 meets the first *Mendoza-Martinez* factor.

B. Paragraph 12 Is Analogous to Historical Punishments

Paragraph 12 is without precedent, but historically, the stripping of legal rights is a classic example of punishment. *Mendoza-Martinez*, 372 U.S. at 168-170; *Trop v.*

Dulles, 356 U.S. 86, 101-02 (1956); *E.B.*, 119 F.3d at 1101. *See also California v. Zamora*, 28 Cal. 3d 88, 102, n. 8, 615 P.2d 1361, 1369, n. 8 (1980) (referring to "ancient and obsolete punishment of outlawry, under which 'one is deprived of the benefit of the law, and out of the King's protection.'" (*quoting* 3 Stroud's Judicial Dictionary, at 1900 (4th ed. 1973))). In this respect, Paragraph 12 is similar to denaturalization, which has historically been regarded as punishment, since it strips individuals of civil rights enjoyed by other persons. In *Trop v. Dulles*, this Court held that the denaturalization of a convicted military deserter could not conceivably serve any purpose other than punishment. 356 U.S. at 97. Paragraph 12's impact is even more severe than in *Trop* because a military deserter can petition a court for protection under the State Constitution. In contrast, a sex offender whose private information is released under Paragraph 12 has no recourse under state law. Thus, this factor also demonstrates that Paragraph 12 is punitive.

C. Applicability to Crimes Requiring Scienter

Commission of a crime of which scienter is a necessary element is a prerequisite to being subject to Paragraph 12. Although, unlike Megan's Law, N.J.S.A. 2C:7-2, Paragraph 12 does not explicitly state that it applies to persons charged with a sex offense but acquitted by reason of insanity, its language appears broad enough to cover such offenders. However, as these persons constitute an exceedingly small minority of those covered by the Amendment, this factor should be deemed to weigh in favor of a finding of a punitive effect.

D. Paragraph 12 Promotes the Traditional Aims of Punishment

Paragraph 12 also serves the traditional punitive aims of punishment – retribution and deterrence. Any reasonable person would consider the loss of civil rights to be a deterrent to crime. The deterrent impact of Paragraph 12 is particularly great considering that it has the effect of denying legal protection from notification laws – which have been shown to subject registrants to physical attack, harassment, loss of employment and housing, and other harms.

In addition, the enactment of Paragraph 12 was certainly retributive. Although the courts upheld the original Megan's Law statute, these decisions reaffirmed the principle that even sex offenders have rights under the law. Paragraph 12 is a direct response to the latter aspect of these decisions. *See supra*. The extreme measure of amending the New Jersey Constitution to strip sex offenders of their rights had a decidedly vindictive quality – especially considering that at the time Paragraph 12 was adopted it was not clear that state law-based restrictions would be a greater obstacle to more expansive community notification than their federal law counterparts (which, of course, could not be affected by Paragraph 12). *See Artway v. Attorney General*, 81 F.3d 1235, 1255 (3d Cir. 1996) (retributive measures are those which mete out "vengeance for its own sake" and "do not seek to affect future conduct or solve any problem except for realizing 'justice.'"). Thus, the fourth *Mendoza-Martinez* factor is satisfied.

E. Paragraph 12 Applies to Conduct That Is Already a Crime

Paragraph 12, by its express terms, applies only to "persons found to have committed a sex offense" which is conduct that already constitutes a crime. *See Hudson*, 522 U.S. at 99. Since Paragraph 12 applies only to those who have previously engaged in criminal behavior, this *Mendoza-Martinez* factor is met.

F. There Is No Alternative Remedial Purpose That Can Reasonably Be Connected to Paragraph 12

This factor asks whether there is an alternative, remedial purpose than can reasonably be assigned to the provision at issue. Although the courts have held that the State has a valid interest in conducting necessary community notification, as noted above, Paragraph 12 does not, in itself, accomplish any community notification. It is a rights-stripping provision, not a community notification measure. Abrogating constitutional rights which have been clearly and repeatedly recognized by the courts should not be considered a valid remedial purpose.

Nor is Paragraph 12 rationally related to any valid remedial desire to expand community notification. The additional notification Paragraph 12 contemplates is notification that would otherwise violate the New Jersey Constitution. Thus, it seeks to legitimize *excessive* notification, over and above the *remedial* notification that is already, or otherwise would be, permitted. It furthers a punitive purpose; it is not rationally connected to a remedial one. Thus, this factor weighs in favor of a finding that Paragraph 12 is impermissibly punitive.

G. Paragraph 12 Is Excessive Beyond What Is Necessary to Achieve a Remedial Purpose

As noted above, Paragraph 12 serves no remedial purpose. Extensive community notification was being conducted before Paragraph 12 was adopted, and the State could have modified the existing community notification scheme to incorporate the use of the Internet without running afoul of Petitioners' constitutional rights. Pl. Ex. 3.[4] Thus, as a general matter, Paragraph 12 is clearly excessive.

Furthermore, Paragraph 12 is also excessive in terms of the breadth of the rights it abrogates, the disclosures it permits, and the offenders to which it applies. The fact that Paragraph 12 was not drafted narrowly to advance any legitimate interest in community notification bears directly on its excessiveness. *See Doe v. Attorney General*, 425 Mass. 217, 221, 680 N.E.2d 97, 99 (1997) (section of Act which provides for unlimited disclosure goes beyond any remedial purpose that may be served and, thus, must be enjoined); *Kansas v. Myers*, 260 Kan. 669, 699, 923 P.2d 1024, 1043 (1996); *Hudson*, 522 U.S. at 499 (Stevens, J., concurring) (excessiveness factor should "tip[ ] the balance in extreme cases").

In sum, all of the *Mendoza-Martinez* factors support the conclusion that Paragraph 12 is punitive. Accordingly, the *ex post facto* and double jeopardy clauses prohibit application of Paragraph 12 to any individual who committed

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[4] Petitioners submitted to the trial court an affidavit from a computer expert proposing an Internet notification scheme that would allow visitors to the web site to access information concerning only those offenders they would likely encounter, based primarily upon the user's location.

their offense prior to November 7, 2000, the day Paragraph 12 was approved.

CONCLUSION

Based upon the foregoing, Petitioners respectfully request that the Court grant their Petition for Certiorari and reverse the Appellate Division ruling upholding Paragraph 12.

Respectfully submitted,

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Attorneys for Petitioners

Dated: December 5, 2006

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-2153-04T12153-04T1

A.A., A.B., A.C., A.D. (by M.M., his natural parent), A.E., A.F., and A.G. (all fictitious initials), individually and on behalf of others similarly situated,

Plaintiffs-Appellants,

v.

STATE OF NEW JERSEY, RICHARD J. CODEY, in his official capacity as ACTING GOVERNOR, STATE OF NEW JERSEY, PETER C. HARVEY, in his official capacity as ATTORNEY GENERAL, STATE OF NEW JERSEY, and JOSEPH R. FUENTES, in his official capacity as SUPERINTENDENT OF THE NEW JERSEY STATE POLICE,

Defendants-Respondents.

Argued December 12, 2005 – Decided April 6, 2006

Before Judges Stern, Fall[1] and C.S. Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, MER-L-20-04.

Brian J. Neff (Schiff Hardin) of the New York bar, admitted pro hac vice, argued the cause for appellants (Yvonne Smith Segars, Public Defender, and Gibbons Del Deo, Dolan, Griffinger & Vecchione, cooperating counsel for the ACLU of New Jersey Foundation, attorneys; Mr. Neff,

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[1] Oral argument was recorded. Judge Fall listened to the tape and participated in the disposition of the appeal because a judge originally assigned to the matter was and remains unavailable due to medical reasons.

Michael Z. Buncher, Deputy Public Defender, Lawrence Lustberg and Edward L. Barocas, on the brief).

Mary Beth Wood, Deputy Attorney General, argued the cause for respondents (Peter C. Harvey, Attorney General, attorney; Patrick DeAlmeida, Assistant Attorney General, of counsel; B. Stephan Finkel, Assistant Attorney General, and Ms. Wood, on the brief).

The opinion of the court was delivered by

STERN, P.J.A.D.

This appeal requires us to consider the constitutionality, under the Supreme law of the land embodied in the Federal Constitution, of a provision of the New Jersey Constitution.

Plaintiffs appeal from a judgment, entered on December 20, 2004, dismissing their complaint challenging Article IV, section VII, paragraph 12 of the New Jersey Constitution (hereinafter Paragraph 12),[2] and its implementing legislation, *N.J.S.A.* 2C:7-12 to -19 (hereinafter "Internet Registry Act" or "the Act" adopted as part of and supplement to "Megan's Law," *N.J.S.A.* 2C:7-1 to -11).[3] The

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[2] Paragraph 12 was adopted at the general election of November 7, 2000, and became effective on December 7, 2000.

[3] The Internet Registry Act was adopted by *L.* 2001, *c.* 167, approved on July 23, 2001. Pursuant to *R.* 4:32-1, the matter before us was certified as a class action, with sub-classes of plaintiffs who committed sex offenses before and after Paragraph 12 was adopted, and before and after the Internet Registry Act was enacted. In dismissing the complaint "for failure to state a claim upon which relief can be granted," the order under review declared both Paragraph 12 and the Internet Registry Act to be constitutional. The Law Division also denied plaintiffs' cross-motion for summary judgment and injunctive relief.

constitutional amendment authorizes, and the statute implements, the posting of information about sex offenders on the Internet. *N.J.S.A.* 2C:7-13. The Act requires that information contained in the central registry of sex offender registrations, maintained by the Superintendent of the State Police, be made available to the public on the internet. *See N.J.S.A.* 2C:7-4, -13.

In essence, plaintiffs assert that "[u]nlike the prior notification law, which was upheld against constitutional attack in large part because it only permitted tailored notification to persons likely to encounter the offender, this new notification scheme requires unlimited, worldwide notification via the Internet." Plaintiffs assert that Paragraph 12 "singles out sex offenders for lesser protection under state law" and that no court has held that such singling out "comports with the federal constitution." They further assert that Paragraph 12 "is a rare example of a per se violation of the federal Equal Protection Clause," and "runs afoul of the rights guaranteed Plaintiffs under the Ex Post Facto and Double Jeopardy clauses of the United States Constitution" and, assuming that the State constitutional provision is itself unconstitutional, that the Internet Registry Act violates the right of privacy recognized by the State Constitution, as well as the ex post facto and double jeopardy clauses of the State Constitution.[4]

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[4] The complaint alleged that Paragraph 12 "violates plaintiff's rights to equal protection under the Fourteenth Amendment" (count one); "violates the Ex Post Facto clause of the United States Constitution" (count two) and "violates the Double Jeopardy clause of the United States Constitution" (count three). Premised thereon, the complaint further alleges that the Act "violates Article I, Section 1, Para[graph] 1 of the New Jersey Constitution," (count four), and "violates the Ex Post

(Continued on following page)

We affirm substantially for the reasons expressed in Judge Andrew Smithson's opinion of December 20, 2004, as developed hereinafter.

I.

In *Doe v. Poritz*, 142 *N.J.* 1 (1995), our Supreme Court held that "Megan's Law" (*L.* 1994, *c.* 128, 133), *N.J.S.A.* 2C:7-1 to -11, which provided for registration and community notification regarding sex offenders,[5] was constitutional. Under Megan's Law, defendants who are convicted, adjudicated delinquent, or found not guilty by reason of insanity of a sex offense are required to register with designated State officials, *N.J.S.A.* 2C:7-2, and the Superintendent of State Police is obligated to maintain a central registry of all Megan's Law registrations. *N.J.S.A.* 2C:7-4(d).

Each registration under Megan's Law must include the registrant's "name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, address of legal residence, address of any current temporary residence, date and place of employment, . . . any anticipated or current school enrollment," "date and place of each conviction, adjudication or acquittal by reason of

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Facto clause of the New Jersey Constitution" (count five) and "violates the Double Jeopardy clause of the New Jersey Constitution" (count six). Counts one and four would also apply to offenses occurring after the effective dates of Paragraph 12 and the Act, respectively.

[5] The Registration Law, *N.J.S.A.* 2C:7-1 to -5, and the Community Notification Law, *N.J.S.A.* 2C:7-6 to -11, are collectively called "Megan's Law" as their adoption followed the death of seven-year-old Megan Kanka who was killed by a convicted sex offender. *See State v. Timmendequas*, 161 *N.J.* 515, 682 (1999).

insanity, indictment number, fingerprints, . . . a brief description of the crime or crimes for which registration is required," and "[a]ny other information that the Attorney General deems necessary to assess [the] risk of future commission of a crime." *N.J.S.A.* 2C:7-4(b). *See also Doe v. Poritz*, *supra*, 142 *N.J.* at 21; *N.J.S.A.* 2C:7-8 (requiring the Attorney General to promulgate guidelines for notification under the Act).

Each Megan's Law registrant is assigned to one of "three levels of notification depending upon the risk of reoffense," *see N.J.S.A.* 2C:7-8(a), (c), as determined by a weighing of factors, "low" risk (Tier One), "moderate" risk (Tier Two), or "high" risk (Tier Three). *N.J.S.A.* 2C:7-8c. The degree of community notification in each case is determined by the registrant's tier assignment. *N.J.S.A.* 2C:7-5 to -8. *See Doe v. Poritz*, *supra*, 142 *N.J.* at 21-22. However, nothing in Megan's Law "shall be construed to prevent law enforcement officers from providing community notification concerning any person who poses a danger under circumstances that are not provided for in [the] act." *N.J.S.A.* 2C:7-10.

In *Doe v. Poritz*, *supra*, the Supreme Court held that the registration and community notification provisions of Megan's Law did not constitute "punishment," and therefore did not violate the ex post facto, double jeopardy, cruel and unusual punishment, or bill of attainder clauses of the Federal Constitution, or the equivalent provisions of the State Constitution (which were to be interpreted consistently with the Federal Constitution, 142 *N.J.* at 42-43). Rather, the legislation was "remedial" in nature and free of "punitive" intent. *Ibid.* The Court concluded:

> [A] statute that can fairly be characterized as remedial, both in its purpose and implementing provisions, does not constitute punishment even though its remedial provisions have some inevitable deterrent impact, and even though it may indirectly and adversely affect, potentially severely, some of those subject to its provisions. Such a law does not become punitive simply because its impact, in part, may be punitive unless the only explanation for that impact is a punitive purpose: an intent to punish.
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> [*Id.* at 43.]

See also id. at 73-75 (statute is "remedial," it is designed to protect the public, and does not constitute "punishment").[6]

With respect to the right to privacy, the Court further held that the registration and community notification provisions of Megan's Law did not deprive sex offenders of their constitutional right to privacy under either the Federal or State Constitutions. A convicted offender's privacy interests were minimally implicated by the public disclosure of his or her home address as part of the information disclosed and by the public disclosure of the other relevant information. In any event, any privacy interests were "substantially outweighed" by the strong State interest in public disclosure for the purpose of protecting the public from the danger of recidivism by sex offenders. Therefore, there was no constitutional violation. *Id.* at 77-91.

In addition, the Court held that Megan's Law did not violate the equal protection rights of sex offenders under

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[6] Justice Stein dissented because the law, in his view, constituted ex post facto punishment. *Id.* at 113-14, 147.

either the Federal or State Constitutions. Sex offenders were not a "suspect class," and the State's decision to treat them as a class was not arbitrary. Therefore, the registration and community notification provisions of Megan's Law were subject only to a "rational basis" analysis, which posed no constitutional concern for the Court. *Doe v. Poritz*, *supra*, 142 *N.J.* at 91-95. However, in order to sustain the constitutionality of the law, the Court held that the prosecutor's decision to provide community notification, including the tier classification which affected the scope of notification, must be subject to judicial review before such notification was given. *Id.* at 29-30. Such review was constitutionally required as a matter of procedural due process and fundamental fairness. The Court outlined detailed instructions regarding the nature of the review proceedings and the procedures to be followed. *Id.* at 12, 30-40, 99-109.

In summary, *Doe v. Poritz*, *supra*, described its holding in the following words:

> The essence of our decision is that the Constitution does not prevent society from attempting to protect itself from convicted sex offenders, no matter when convicted, so long as the means of protection are reasonably designed for that purpose and only for that purpose, and not designed to punish; that the community notification provided for in these laws, given its remedial purpose, rationality, and limited scope, further assured by our opinion and judicial review, is not constitutionally vulnerable because of its inevitable impact on offenders; that despite the possible severity of that impact, sex offenders' loss of anonymity is no constitutional bar to society's attempt at self-defense. The Registration and

> Notification Laws are not retributive laws, but laws designed to give people a chance to protect themselves and their children. They do not represent the slightest departure from our State's or our country's fundamental belief that criminals, convicted and punished, have paid their debt to society and are not to be punished further. They represent only the conclusion that society has the right to know of their presence not in order to punish them, but in order to protect itself. The laws represent a conclusion by the Legislature that those convicted sex offenders who have successfully, or apparently successfully, been integrated into their communities, adjusted their lives so as to appear no more threatening than anyone else in the neighborhood, are entitled not to be disturbed simply because of that prior offense and conviction; but a conclusion as well, that the characteristics of some of them, and the statistical information concerning them, make it clear that despite such integration, reoffense is a realistic risk, and knowledge of their presence a realistic protection against it.[7]
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> [*Id.* at 12-13.]

Following *Doe v. Poritz*, *supra*, the Supreme Court upheld the Attorney General's Registrant Risk Assessment Scale under which prosecutors assess the risk of re-offense and appropriate tier level of notification. *In re Registrant J.M.*, 167 *N.J.* 490, 501-04 (2001); *In re C.A.*, 146 *N.J.* 71, 88-110 (1996). The Court emphasized, however, that a

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[7] At the time, the Attorney General's guidelines limited registration to prior convicted offenders who were classified as "repetitive and compulsive" sex offenders and newly convicted sex offenders. *Doe v. Poritz*, *supra*, 142 *N.J.* at 20.

court reviewing a tier classification should make its own determination on a case-by-case basis, using the scale only as a guide. *In re C.A.*, *supra*, 146 *N.J.* at 108-09.

In *In re Registrant G.B.*, 147 *N.J.* 62, 85 (1996), the Court further held that a registrant may lodge "three distinct challenges to his [or her] tier designation": "a registrant may introduce evidence [(1)] that the calculation that led to the Scale score was incorrectly performed either because of a factual error, because the registrant disputes a prior offense, because the variable factors were improperly determined, or for similar reasons"; (2) "that the Scale calculations do not properly encapsulate his [or her] specific case[,]" and he or she "deserves to be placed in a tier other than that called for by the prosecutor's Scale score"; and (3) "that the extent of notification called for by his [or her] tier categorization is excessive because of unique aspects of his [or her] case." *Ibid.* In other words, a registrant may lodge challenges that "relate to characteristics of the individual registrant and the shortcomings of the Scale in [the registrant's] particular case." *Ibid.* A registrant, however, may not challenge "the Scale itself or . . . the weight afforded to any of the individual factors that comprise the Scale." *Ibid.*

The *G.B.* Court further held that, subject to the trial court's discretion, expert testimony is admissible with respect to the permissible types of challenges to a tier designation. At all times, however, "[t]he trial court has the ultimate authority to decide what weight to attach to the Scale and what weight to attach to expert testimony." *Ibid.* In other words, the courts have "the nondelegable responsibility to determine a registrant's tier classification and [therefore] the scope of community notification." *Ibid.* Moreover, the State has the burden to prove the propriety

of the tier classification and notification plan by clear and convincing evidence. *In re M.F.*, 169 *N.J.* 45, 54 (2001). On those bases Megan's Law has been sustained and implemented in New Jersey.

Fundamental challenges to Megan's Law have been similarly unsuccessful in the federal courts. *See Artway v. Attorney General*, 81 *F.*3d 1235 (3d Cir. 1996) (registration is not "punishment" and therefore does not violate ex post facto, double jeopardy, or bill of attainder provisions of the federal constitution; "repetitive and compulsive" classification does not violate equal protection, and the law is not violative of due process or unconstitutionally vague); *E.B. v. Verniero*, 119 *F.*3d 1077, 1081, 1105-1107 (3d Cir. 1997), *cert. denied*, 522 *U.S.* 1109, 118 *S. Ct.* 1039, 140 *L. Ed.* 2d 105 (1998) (notification requirement not "punishment" and not violative of ex post facto or double jeopardy provisions of federal constitution, but due process required State to prove by clear and convincing evidence that Tier Two or Three classification and notification plan was appropriate prior to notification); *Paul P. v. Verniero*, (hereinafter *Paul P. I*) 170 *F.*3d 396 (3d Cir. 1999) (no violation of right to privacy); *Paul P. v. Farmer*, (hereinafter *Paul P. II*) 227 *F.*3d 98 (3d Cir. 2000) (Attorney General Guidelines regarding community notification do not infringe on privacy interests).

Plaintiffs insist that the Internet postings provide far more access to registrant information and therefore constitute "punishment" which was not involved in the original Megan's Law as sustained, with modification to provide for hearings on contested risk assessments, in *Doe v. Poritz* and by the Third Circuit. Plaintiffs correctly note that the opinions upholding community notification focused on the relatively limited nature of the notification

of Tier Two and Tier Three offenders subject to public disclosure. *See N.J.S.A.* 2C:7-8(c) (scope of notification). Plaintiffs assert, in any event, that Paragraph 12 violates the Equal Protection clause of the Federal Constitution.

II.

The constitutional amendment embodied in Paragraph 12 trumps all other provisions of the State Constitution. It provides:

> *Notwithstanding any other provision of this constitution and irrespective of any right or interest in maintaining confidentiality,* it shall be lawful for the Legislature to authorize by law the disclosure to the general public of information pertaining to the identity, specific and general whereabouts, physical characteristics and criminal history of persons found to have committed a sex offense.
>
> [*N.J. Const.* art. IV, § 7, ¶ 12 (emphasis added).]

In light of the language of Paragraph 12, there can be little doubt that any other provision of the State Constitution can be utilized to prohibit disclosures regarding those "found to have committed a sex offense." Moreover, in the absence of any legislative or other history to the contrary, the introductory language of Paragraph 12 cannot be read to apply only to those offenders convicted after its effective date. Therefore, any other State constitutional provisions concerning retroactive impact cannot be said to apply independent of the fact they have previously been read to be coextensive with analogous provisions of the Federal Constitution.

We reject plaintiffs' challenges to Paragraph 12 under the double jeopardy and ex post facto provisions of the Federal Constitution. In fact, the Third Circuit denied a preliminary injunction in this case based on those arguments and plaintiffs' contentions that their privacy rights were violated. *See A.A. v. New Jersey*, 341 *F.*3d 206, 209 (3d Cir. 2003) (relying on *Smith v. Doe*, 538 *U.S.* 84, 89-91, 123 *S. Ct.* 1140, 1145-46, 155 *L. Ed.* 2d 164, 174-76 (2003)).

In *Smith v. Doe*, *supra*, the United States Supreme Court held that Alaska's Megan's Law was not punishment prohibited by the ex post facto clause of the Federal Constitution. *Id.* at 92-106, 123 *S. Ct.* at 1146-54, 155 *L. Ed.* 2d at 176-85. In reaching this conclusion, the Court stated:

> [T]he stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

> The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.
>
> The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry.
>
> [*Id.* at 98-99, 123 *S. Ct.* at 1150-51, 155 *L. Ed.* 2d at 180-81.]

Speaking through Justice Kennedy, the Court further stated:

> The Ninth Circuit highlighted that the information was available "world-wide" and "broadcas[t]"

> in an indiscriminate manner. As we have explained, however, the [Internet] notification system is a passive one: An individual must seek access to the information. The Web site warns that the use of displayed information "to commit a criminal act against another person is subject to criminal prosecution." Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment.
>
> The excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective. The Act meets this standard.
>
> [*Id.* at 104-05, 123 *S. Ct.* at 1153-54, 155 *L. Ed.* 2d at 184-85 (internal citations omitted).][8]

On the same day *Smith v. Doe*, *supra*, was decided, the Supreme Court also upheld the constitutionality of Connecticut's Internet sex offender registry. The Court held that the Connecticut statute, which posted sex offender information based solely upon offenders' past convictions, did not violate offenders' procedural due process rights. There was no procedural due process

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[8] In *Smith v. Doe*, *supra*, the State conceded that the statute might have a deterrent impact, and the Court agreed that "governmental programs might deter crime without imposing punishment." *Id.* at 102, 123 *S. Ct.* 1152, 155 *L. Ed.* 2d at 183. Referring to recent studies, the Court stated that "Alaska could conclude that a conviction for a sex offense provides evidence of a substantial risk of recidivism." *Id.* at 103, 123 *S. Ct.* at 1153, 155 *L. Ed.* 2d at 184.

requirement that, in order to post sex offender information, the state provide a hearing and establish that the offender is currently dangerous. *Conn. Dept. of Pub. Safety v. Doe*, 538 *U.S.* 1, 4-8, 123 *S. Ct.* 1160, 1162-65, 155 *L. Ed.* 2d 98, 102-05 (2003).[9]

The critical issue before us, therefore, is whether Paragraph 12 violates the Equal Protection Clause of the *Fourteenth Amendment*. Significantly, the equal protection argument was not resolved in plaintiffs' prior federal litigation, *A.A.*, *supra*, 341 *F.*3d 206, and equal protection arguments were not raised in *Smith v. Doe*, *supra*, or *Conn. Dept. of Pub. Safety v. Doe*, *supra*.

Plaintiffs insist that a state cannot discriminate against sex offenders and that there is no ability to provide in a constitution for different treatment of sex offenders than any other group of criminals. While we have some sympathy for the arguments that access or availability of the information should be limited geographically or otherwise, we must reject the contention because our function is only to determine constitutionality, not to evaluate or decide public policy.

We emphasize, as has the United States Supreme Court, that:

> In this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people . . . as a whole. This constitutional provision reflects both the considered judgment of the state legislature that

[9] The Court expressly noted it was not addressing any substantive due process claim. *Id.* at 8. *See also* concurring opinions of Justices Scalia and Souter.

> proposed it and that of the citizens . . . who voted for it. "[W]e will not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational."
>
> [*Gregory v. Ashcroft*, 501 *U.S.* 452, 471, 111 *S. Ct.* 2395, 2406, 115 *L. Ed.* 2d 410, 430 (1991) (internal citations omitted).]

See also State v. Muhammad, 145 *N.J.* 23, 41-44 (1996) (upholding victim impact statute, *N.J.S.A.* 2C:11-3c(6), in light of the Victim Rights Amendment embodied in *N.J. Const.* art I, ¶ 22).

The Fourteenth Amendment to the Federal Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const.* amend. XIV, ¶ 1. The equal protection clause does not preclude the use of classifications. It requires only that classifications not be arbitrary. *Doe v. Poritz*, *supra*, 142 *N.J.* at 91. In other words, the Constitution does not require things that are different in fact to be treated in law as though they were the same. Moreover,

> [t]he initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.

[*Plyler v. Doe*, 457 *U.S.* 202, 216, 102 *S. Ct.* 2382, 2394, 72 *L. Ed.* 2d 786, 798-99 (1982).]

The level of scrutiny applied to legislation challenged on equal protection grounds depends on the nature of the classification at issue. If a legislative classification does not burden a fundamental right or target a suspect class, it will be upheld so long as it bears a rational relation to a legitimate government interest. *Romer v. Evans*, 517 *U.S.* 620, 631, 116 *S. Ct.* 1620, 1627, 134 *L. Ed.* 2d 855, 865 (1996); *Doe v. Poritz*, *supra*, 142 *N.J.* at 92.

The rational basis test applies in this case since sex offenders are not a suspect class. *Doe v. Moore*, 410 *F.*3d 1337, 1342-48 (11th Cir. 2005) (finding under the "rational basis" test no equal protection violation with respect to Florida's sex offender registration-notification law); *Cutshall v. Sundquist*, 193 *F.*3d 466, 482-83 (6th Cir. 1999) (Tennessee Registration and Monitoring Act "subject to scrutiny under rational basis test" and does not violate equal protection), *cert. denied*, 529 *U.S.* 1053, 120 *S. Ct.* 1554, 146 *L. Ed.* 2d 460 (2000); *Artway*, *supra*, 81 *F.*3d at 1267 (requirement that "compulsive and repetitive" sex offenders register under original Megan's Law did not violate equal protection); *Doe v. Poritz*, *supra*, 142 *N.J.* at 92-93; *State v. Wingler*, 25 *N.J.* 161, 174-76 (1957) (separate classification and treatment of sex offenders has a rational basis and is constitutional).

In fact, the United States Supreme Court has stated that "the equal protection clause does not prohibit the legislature from recognizing 'degrees of evil' " and differentiating between crimes or offenders, *Skinner v. Oklahoma*, 316 *U.S.* 535, 540, 62 *S. Ct.* 1110, 1113, 86 *L. Ed.* 1655, 1659-60 (1942), and our Supreme Court has stated, in

upholding Megan's Law, that "[i]t is well settled that classifying offenders according to the offense committed is subjected to rational basis analysis." *Doe v. Poritz*, *supra*, 142 *N.J.* at 92. Furthermore, in *Smith v. Doe*, *supra*, 538 *U.S.* at 103, 123 *S. Ct.* at 1153, 155 *L. Ed.* 2d at 184, the United States Supreme Court quoted authority relating to the high rate of recidivism among sex offenders and the possibility of re-offending at long intervals thereby demonstrating a rational basis for treating them differently from other offenders.

A classification involving neither fundamental rights nor a suspect class is accorded a strong presumption of validity. The rational basis test "'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices,'" and it does not empower the judiciary to act as a super-legislature, judging the wisdom or desirability of legislative policy. *Heller v. Doe*, 509 *U.S.* 312, 319, 113 *S. Ct.* 2637, 2642, 125 *L. Ed.* 2d 257, 270 (1993) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 *U.S.* 307, 313, 113 *S. Ct.* 2096, 2101, 124 *L. Ed.* 2d 211, 221 (1993)).

At argument before us, plaintiffs relied principally on *Romer v. Evans*, *supra*, 517 *U.S.* at 631-36, 116 *S. Ct.* at 1627-29, 134 *L. Ed.* 2d at 865-68, to support their equal protection argument. In *Romer*, *supra*, the Supreme Court declared unconstitutional an amendment to the Colorado constitution that prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect gays and lesbians. The Court found the constitutional amendment offensive to equal protection because it identified persons by "a single trait," homosexuality, and denied them the right to seek "specific protection from the law" – a result the Court found "unprecedented in our jurisprudence." *Id.* at 633, 116 *S. Ct.* at 1628, 134

L. Ed. 2d at 866. Essentially, the Court found that there was no "rational relationship to legitimate state interests" served by the constitutional amendment, *id.* at 632, 116 *S. Ct.* at 1627, 134 *L. Ed.* 2d at 866, because there is no "legitimate government interest" to "harm a politically unpopular group." *Id.* at 634, 116 *S. Ct.* at 1628, 134 *L. Ed.* 2d at 867. *See also Citizens for Equal Protection v. Attorney General*, 368 *F. Supp.* 2d 980 (D. Neb. 2005) (Nebraska's constitutional amendment prohibiting same-sex marriages violated Federal Constitution because of broad disability on single group based on their status).

The classification in *Romer*, *supra*, however, was based on an individual's sexual orientation, not on conduct evidenced by his or her criminal wrongdoing. States are permitted to make classifications based on conduct in order to further a legitimate interest in protecting their citizens. *See, e.g.*, *Smith v. Doe*, *supra*; *Conn. Dept. of Pub. Safety v. Doe*, *supra*, (both rejecting challenges to Megan's Law postings because of the fact the subjects were convicted sex offenders); *Able v. United States*, 155 *F.*3d 628, 632 (2d Cir. 1998) ("The suspect or quasi-suspect classes that are entitled to heightened scrutiny have been limited to groups generally defined by their status . . . and not by the conduct in which they engage").[10]

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[10] Unlike *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 *U.S.* 432, 105 *S. Ct.* 3249, 87 *L. Ed.* 2d 313 (1985) involving mentally retarded citizens, and *Plyler v. Doe*, 457 *U.S.* 202, 226, 102 *S. Ct.* 2382, 72 *L. Ed.* 2d 786, 805 (1982), *reh'g denied*, 458 *U.S.* 1131, 103 *S. Ct.* 14, 73 *L. Ed.* 2d 1401 (1982), involving the education of the children of undocumented aliens, the rational basis for the classification in this case is premised on the illegal conduct of sex offenders themselves, and not merely on their status.

The New Jersey voters' adoption of Paragraph 12 was premised on the view that widespread notification offers a means by which members of the general public may protect themselves from the risk of recidivism by the more dangerous sex offenders. Significantly, that view is shared by the legislatures of other states as well as the United States Congress. *See* 42 *U.S.C.* § 14071 (statute making receipt of certain federal funds contingent upon states' implementation of sex offender registration and community notification programs); *Smith v. Doe*, *supra*, 538 *U.S.* at 89, 123 *S. Ct.* at 1145, 155 *L. Ed.* 2d at 174 (noting that, by 1996, every state, the District of Columbia, and the federal government had enacted some variation of Megan's Law). *See also McKune v. Lile*, 536 *U.S.* 24, 32-33, 122 *S. Ct.* 2017, 2024, 153 *L. Ed.* 2d 47, 56 (2002) (noting that "[s]ex offenders are a serious threat in this Nation" and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault").

Thus, Paragraph 12 serves a legitimate state interest in public safety and does not irrationally target an unpopular group. It is not unprecedented for the government to, by constitutional amendment or statute, limit the constitutional rights of convicted criminals, or to subordinate the constitutional rights of convicted criminals to the safety rights of the general public. For example, both the Federal and State Constitutions authorize the disenfranchisement of convicted criminals. *U.S. Const.* amend. XIV, § 2; *N.J. Const.* art. II, § 1, ¶ 7; *N.J. State Conf. NAACP v. Harvey*, 381 *N.J. Super.* 155 (App. Div. 2005). Similarly, convicted criminals may lawfully be deprived of the right to bear arms. *See United States v. Everist*, 368 *F.*3d 517, 519 (5th Cir. 2004); *Burton v. Sills*, 53 *N.J.* 86, 95-101

(1968), *appeal dismissed*, 394 *U.S.* 812, 89 *S. Ct.* 1486, 22 *L. Ed.* 2d 748 (1969).

Paragraph 12 withstands scrutiny under the Equal Protection Clause. It merely authorizes the Legislature to pass legislation that allows the disclosure to the general public of specified information regarding convicted sex offenders. In *Doe v. Poritz*, *supra*, 142 *N.J.* at 91-95, the Court held that the registration and community notification provisions of Megan's Law did not violate the equal protection clause of either the Federal or State Constitutions. The Court stated that "[t]he Legislature has determined that convicted sex offenders represent a risk to the public safety and that knowledge of their identities and whereabouts is necessary for protection of the public." *Id.* at 93. Therefore, the Legislature's decision to subject sex offenders to registration and community notification was rationally related to a legitimate government purpose. *Id.* at 91-95. As an intermediate appellate court we decline to disturb that holding merely because Megan's Law disclosures are now on the Internet.

We hold that the State has a rational and legitimate basis for allowing citizens to be aware of and to protect their children from sex offenders, and uphold the constitutionality of Paragraph 12 under the federal Equal Protection clause.

We emphasize, however, that because Paragraph 12 authorizes the Legislature to adopt legislation relating to the disclosure of specified sex offender information, and also leaves the Legislature to determine the scope, manner and format of "the disclosure," it is appropriate to evaluate the constitutional challenge in light of the present statutory scheme embodied in the Internet Registry Act. Under

the present statute, Internet posting is permitted only for Tier Three and some Tier Two offenders, *see N.J.S.A.* 2C:7-13(b)-(f), and the offenders continue to have the right, developed under case law,[11] to challenge their relevant tier classification for purposes of notification. Pursuant to *N.J.S.A.* 2C:7-13(d), offenders classified as having a moderate risk of recidivism and subject to notification under *N.J.S.A.* 2C:7-8(c)(2), may be excepted from the posting if convicted of certain offenses, are related, or stand in loco parentis, to the victim or the crime arose from a consensual relationship. *N.J.S.A.* 2C:7-13g details the information which is to be posted and "made publicly available on the Internet."

Plaintiffs express concerns that Megan's Law can be amended to expand Internet posting in light of the broad language of Paragraph 12 or possibly go beyond the Internet, as the paragraph is not limited to the Internet. At this stage, however, we cannot consider a facial challenge to Paragraph 12 under the Federal Constitution, or invalidate it, "based on a worst-case analysis that may never occur[,]" *Ohio v. Akron Center for Reproductive Health*, 497 *U.S.* 502, 514, 110 *S. Ct.* 2972, 2981, 111 *L. Ed.* 2d 405, 420 (1990), especially when the present statutory complex poses no federal constitutional concern. *See N.J.S.A.* 2C:7-12 to -19; and the implementing Attorney General Guidelines, http://www.njcdj.org (last visited Feb. 14, 2006).

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[11] The amendment to our State constitution cannot affect the decisions of the federal courts under the federal constitution.

We also find no federal cognizable right to privacy violated by Paragraph 12. Indeed, the Third Circuit has already held, albeit for purposes of injunctive relief, that the dissemination of the information referenced in Paragraph 12 does not violate any constitutional right to privacy. *A.A.*, *supra*, 341 *F.*3d at 210-14; *see also Paul P. II*, *supra*, 227 *F.*3d at 105-07; *Paul P. I*, *supra*, 170 *F.*3d at 404-06; *Smith v. Doe*, *supra*, 142 *N.J.* at 77-91. Moreover, as we have already developed, the United States Supreme Court has upheld the constitutionality of Internet sex offender registries under the Federal Constitution, concluding that Internet notification is not punishment for ex post facto purposes. *Smith v. Doe*, *supra*, 538 *U.S.* at 89-91, 123 *S. Ct.* at 1145-46, 155 *L. Ed.* 2d at 174-76. *See also Conn. Dept. of Pub. Safety v. Doe*, *supra*, 538 *U.S.* at 4-8, 123 *S. Ct.* at 1162-65, 155 *L. Ed.* 2d at 102-05.

Finally, plaintiffs acknowledge that their challenge to the Internet Registry Law under the ex post facto, double jeopardy and privacy provisions of the New Jersey Constitution must fail if Paragraph 12 is constitutional.

III.

Our concurring colleague would avoid consideration of the constitutionality of Paragraph 12 by concluding that the Act is constitutional under the New Jersey Constitution as it stood before the amendment. We are not so sure of that conclusion, given the scope of the Act and accessibility of information on the Internet, including the tier two cases not excepted by *N.J.S.A.* 2C:7-13. In any event, we see no reason, as a matter of sound judicial philosophy, to avoid deciding the constitutional issue presented to us by

deciding other constitutional issues by reference to constitutional provisions which no longer control the question.

The judgment is affirmed.

FISHER, J.A.D., concurring.

I

Article IV, Section 7, Paragraph 12 (hereafter Paragraph 12) of the New Jersey Constitution enables the Legislature to "authorize by law the disclosure to the general public of information pertaining to the identity, specific and general whereabouts, physical characteristics and criminal history of persons found to have committed a sex offense." This constitutional amendment also purports to preclude any state constitutional challenge by declaring that any legislation so enacted will be considered lawful "[n]otwithstanding any other provision of this constitution and irrespective of any right or interest in maintaining confidentiality."

Paragraph 12 was adopted by the people of this State at the 2000 general election. On July 23, 2001, the Legislature enacted the Sex Offender Internet Registry Act (Internet Registry Act), *N.J.S.A.* 2C:7-12 to -19. Soon thereafter, plaintiffs filed a complaint in federal court seeking invalidation of the Internet Registry Act. The district court denied plaintiffs' motion for a preliminary injunction except that the court determined that the registry must exclude certain information regarding plaintiffs' whereabouts. *A.A. v. New Jersey*, 176 *F. Supp.* 2d 274 (D.N.J. 2001). The court of appeals held that plaintiffs were not entitled to interlocutory injunctive relief and directed, on remand, that the relief previously granted to

plaintiffs be vacated. *A.A. v. New Jersey*, 341 *F.*3d 206 (3rd Cir. 2003). Later, the district court granted plaintiffs' motion for a voluntary dismissal.

On January 2, 2004, plaintiffs filed a complaint in the Law Division, contending that the Internet Registry Act violates various federal and state constitutional provisions. And, because Paragraph 12 purports to shield the Internet Registry Act from state constitutional attack, plaintiffs also asserted in their complaint that Paragraph 12 violates the federal equal protection clause. The trial judge granted the motion to dismiss and plaintiffs appealed.

In affirming the dismissal of plaintiffs' complaint, my colleagues have concluded (1) that the Internet Registry Act does not violate the federal ex post facto[1] and double jeopardy[2] clauses; (2) that Paragraph 12 "trumps" all the state constitutional arguments marshaled by plaintiffs in their attack on the Internet Registry Act; and (3) that Paragraph 12 does not violate the federal equal protection clause.[3] I agree that we are constrained to conclude that plaintiffs' federal ex post facto and double jeopardy arguments are without merit and that Paragraph 12, if valid, "trumps" all plaintiffs' state constitutional contentions, but I respectfully disagree that it is necessary that we consider whether Paragraph 12 violates the federal equal protection clause.

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[1] *U.S. Const.*, Art. I, § 10.

[2] *U.S. Const.*, Amend. V.

[3] *U.S. Const.*, Amend. XIV, ¶ 1.

First, like the majority, I agree that the Supreme Court of the United States has determined that internet registry acts like that enacted by our Legislature do not violate the federal ex post facto and double jeopardy clauses. *See Smith v. Doe*, 538 *U.S.* 84, 89-91, 123 *S. Ct.* 1140, 1145-46, 155 *L. Ed.* 2d *164*, 174-76 (2003); *Conn. Dep't of Pub. Safety v. Doe*, 538 *U.S.* 1, 4-8, 123 *S. Ct.* 1160, 1162-65, 155 *L. Ed.* 2d 98, 102-05 (2003). Since we are bound by those rulings, I agree there is no merit to plaintiffs' federal constitutional attacks on the Internet Registry Act and that we are obligated to affirm the dismissal of those portions of plaintiffs' complaint.

Second, I agree that the only fair interpretation of Paragraph 12 is that its purpose and intent is to disable all the state constitutional rights possessed by sex offenders insofar as they may apply to any notification laws that our Legislature may enact.

And third, although I do not agree with my colleagues' disposition of plaintiffs' federal equal protection argument, I nevertheless join in affirming the judgment of the trial court because I believe such a ruling is not necessary to our disposition of this appeal. That is, rather than consider whether Paragraph 12 passes federal equal protection muster, I believe we should first determine whether there is merit to the state constitutional arguments posed by plaintiffs in their attack on the Internet Registry Act, which Paragraph 12 was designed to bar. Since I believe the jurisprudence developed in *Doe v. Poritz*, 142 *N.J.* 1 (1995), to which we are bound, requires our acknowledgement that the Internet Registry Act does not violate state

constitutional ex post facto,[4] double jeopardy[5] and privacy[6] rights, I would not reach the issue posed in the opening sentence of the majority opinion. I offer the following in further explanation of my views.

II

Paragraph 12 was adopted to alleviate the concerns harbored by the Legislature that the judicial branch might find a state constitutional basis for invalidating in whole or in part an internet registry act.[7] Its opening phrase

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[4] *N.J. Const.*, Art. IV, § 7, ¶ 3.

[5] *N.J. Const.*, Art. I, ¶ 11.

[6] *N.J. Const.*, Art. I, ¶ 1.

[7] At a public hearing on June 1, 2000, a sponsor of the bill explained that the proposed constitutional amendment was a reaction to opinions expressed by certain members of the United States Court of Appeals for the Third Circuit and the Supreme Court of New Jersey:

> What we are looking to do with this constitutional amendment is to see that, once and for all, the public's right to have knowledge about sexual predators is actually provided and that there is constitutional backing to allow such disclosure.
>
> Many of us, myself included, believe that, under both the New Jersey Constitution as well as the U.S. Constitution, notwithstanding the provisions of the 14th Amendment, that this right exists today. And nevertheless, given that there are those in the 3rd Circuit, as well as perhaps on our Supreme Court, who feel differently, we want to make sure that there is no ambiguity as to the intent of this Legislature, and hopefully the administration, in terms of seeing that this information is information which rightly should be broadly disseminated.
>
> [Transcript of Public Hearing before the Assembly Law and Public Safety Committee regarding Assemb. Con. Res. No. 1, pp. 1-2, http://www.njleg.state.nj.us/legislativepub/pubhear/060100gg.htm (last visited March 7, 2006).]

("Notwithstanding any other provision of this constitution and irrespective of any right or interest in maintaining confidentiality") unmistakably reveals the legislative intent, and the intent of the people who embraced it at the 2000 general election, to have Paragraph 12 act as a *deus ex machina* to rescue all parts of the Internet Registry Act from state constitutional attack.

In considering the issues presented in this appeal, my colleagues have concluded that we must first consider the constitutional validity of Paragraph 12 and only upon its failure to pass constitutional muster should we consider the state constitutional arguments asserted by plaintiffs in their attack on the Internet Registry Act. I respectfully disagree with my colleagues' approach because I do not find any state constitutional infirmity in the Internet Registry Act that requires the application of the rights-stripping provision of Paragraph 12. *See Donadio v. Cunningham*, 58 *N.J.* 309, 325-26 (1971) ("[A] court should not reach and determine a constitutional issue unless absolutely imperative in the disposition of the litigation."). *See also In the Matter of N.J. Amer. Water Co.*, 169 *N.J.* 181, 197 (2001); *O'Keefe v. Passaic Valley Water Comm'n*, 132 *N.J.* 234, 240 (1993); *Green Township Educ. Ass'n v. Rowe*, 328 *N.J. Super.* 525, 531 (App. Div. 2000).

The controversy regarding Paragraph 12's constitutionality is relevant only to the extent that this constitutional amendment potentially serves to eradicate plaintiffs' right to assert state constitutional rights in attacking the validity of the Internet Registry Act, or any future legislation falling within its scope. I believe plaintiffs' state constitutional claims lack substance and, because they lack substance, I would conclude it is unnecessary that we consider the more momentous question of whether the

people of New Jersey could amend their constitution to deprive, in this context, a class of citizens of all state constitutional rights without running afoul of the federal equal protection clause. Only when, if ever, the Legislature enacts laws that would infringe plaintiffs' pre-existing state constitutional rights should we consider whether Paragraph 12 violates the federal equal protection clause.

Plaintiffs' state constitutional claims are, in essence, based upon their argument that the Internet Registry Act makes available personal information, including their present whereabouts, to an audience far greater than necessary to meet the objectives of this legislation. As a result of the enormous class of persons now able to learn of their whereabouts, plaintiffs assert that the intent of the Internet Registry Act, as well as its likely consequences, is to render them outlaws, to deprive them of all rights, and, in essence, requires that they wear an electronic scarlet letter, expressive of their past crimes and visible to anyone in the world with internet access and the desire to look. Since this court is governed by existing jurisprudence on these points, I believe we are bound to recognize that, notwithstanding plaintiffs' forceful arguments, their state constitutional ex post facto, double jeopardy and right of privacy claims are without merit.

A. The Ex Post Facto and Double Jeopardy Claims

I agree with plaintiffs that the broad availability of information authorized by the Internet Registry Act suggests that the stigma imposed is not just regulatory but instead represents a punitive consequence prohibited by the ex post facto clause. However, by the same token, I am obligated to recognize that we are not writing on a

blank slate. In *Doe v. Poritz*, *supra*, 142 *N.J.* at 42-43, the Court held that our interpretation of the state constitutional ex post facto clause must follow the manner in which the federal ex post facto clause is interpreted. *See also State v. Muhammad*, 145 *N.J.* 23, 56-57 (1996); *Auge v. N.J. Dep't of Corrections*, 327 *N.J. Super.* 256, 263 (App. Div.), *certif. denied*, 164 *N.J.* 559 (2000). Since the Supreme Court of the United States determined that Alaska's similar internet registry act did not violate the federal ex post facto clause, *Smith v. Doe*, *supra*, 538 *U.S.* at 105-06, 123 *S. Ct.* at 1154, 155 *L. Ed.* 2d at 185, it necessarily follows that we should also construe the state constitutional ex post facto clause in the same way.

It also follows, for essentially the same reasons, that plaintiffs' state double jeopardy argument must fall, since this clause applies only to criminal punishment and not civil regulation. *See, e.g.*, *Hudson v. United States*, 522 *U.S.* 93, 98-99, 118 *S. Ct.* 488, 493, 139 *L. Ed.* 2d 450, 458-59 (1997); *Doe v. Poritz*, *supra*, 142 *N.J.* at 70-71. As in the ex post facto context, our courts have concluded that the protections afforded by the state double jeopardy clause are co-extensive with those provided by the federal double jeopardy clause. *See State v. Widmaier*, 157 *N.J.* 475, 490 (1999); *Auge*, *supra*, 327 *N.J. Super.* at 263.

B. The Right of Privacy Claims

I would conclude that *Doe v. Poritz* requires that we reject plaintiff's right of privacy claim. Although the right of privacy has many strands, plaintiffs' privacy claim chiefly rests upon the contention that the Internet Registry Act violates their right to be free from the State's disclosure of private facts about them.

In considering the extent of the federal constitutional right of privacy in this regard, our Supreme Court has recognized that the information which could be disseminated through application of the then-existing registration laws was "readily available to the public" and thus not within "the ambit of constitutional protection." *Doe v. Poritz*, *supra*, 142 *N.J.* at 79. *See also Doe v. City of New York*, 15 *F.*3d 264, 268 (2d Cir. 1994) ("[A]n individual cannot expect to have a constitutionally protected privacy interest in matters of public record."). The very information that is disseminated on the Internet regarding these plaintiffs was recognized by the Court as being available to the public in other locations. *Doe v. Poritz*, *supra*, 142 *N.J.* at 79-81. And, although the Court acknowledged that constitutional privacy protection may be afforded to available information when transformed from "scattered . . . bits of information" into a "compilation of otherwise hard-to-obtain information," *id.* at 85-86 (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 *U.S.* 749, 764, 109 *S. Ct.* 1468, 1477, 103 *L. Ed.* 2d 774, 790 (1989)), the Court held that the state interest in public disclosure of such information substantially outweighs plaintiffs' interest in privacy, explaining in part:

> First, the information requested is not deserving of a particularly high degree of protection. We are not dealing with thoughts and feelings revealed in the course of psychiatric treatment, [citing *Ms. B. v. Montgomery Cty. Emerg. Serv., Inc.*, 799 *F. Supp.* 534, 538 (E.D.Pa. 1992) *aff'd*, 989 *F.*2d 488 (3rd Cir.), *cert. denied*, 510 *U.S.* 860, 114 *S. Ct.* 174, 126 *L. Ed.* 2d 133 (1993)], medical information in general, [citing *United States v. Westinghouse Elec. Corp.*, 638 *F.*2d 570,

> 577 (3rd Cir. 1980)], or medical information regarding HIV status, *Doe v. Borough of Barrington*, 729 *F. Supp.* 376, 384 (D.N.J. 1990). Plaintiff, therefore, can claim only a most limited expectation of privacy in the information to be disseminated. Second, because of the public nature of the information, we cannot speak of harm either from non-consensual disclosure or damage to the relationship in which the records were generated. We neither risk exposing intimate details of plaintiff's life, like those laid bare to a psychiatrist, nor do we risk damaging a relationship like that between patient and doctor by releasing plaintiff's name, address or description. *See Ms. B., supra*, 799 *F. Supp.* at 538.
>
> Counterbalanced against plaintiff's diminished privacy interest is a strong state interest in public disclosure. There is an express public policy militating toward disclosure: the danger of recidivism posed by sex offenders. The state interest in protecting the safety of members of the public from sex offenders is clear and compelling.
>
> [*Doe v. Poritz*, *supra*, 142 *N.J.* at 88-89.]

As a result, the Court concluded that the federal right of privacy did not provide a basis for setting aside any part of the registration and notification statutes then in question.

For similar reasons, the Court rejected the state constitutional privacy arguments, explaining that "the result of our balancing" for state constitutional purposes "is no different than that under the Federal Constitution," *id.* at 90, explaining:

> We find that the state interest in protecting the public is legitimate and substantial. We find,

> more importantly, that the interest in disclosure substantially outweighs the interest in nondisclosure. Because none of the information disclosed under the Registration Law is confidential, requiring disclosure of such information results in a minimal invasion of privacy. Although the potential consequences of active dissemination under the Notification Law alter the privacy interests, the incursion on those interests is necessary for the protection of the public, as the means chosen are narrowly tailored to that interest.
>
> [*Id.* at 90-91.]

The Court's linking of the scope of the state right of privacy to the means chosen for disclosure suggests the vulnerability of the Internet Registry Act to this state constitutional right. However, considering that the postings about plaintiffs on the internet represent passive collections of information also available elsewhere and serves, as observed in *Smith v. Doe*, to merely make such a document search "more efficient, cost effective and convenient," 538 *U.S.* at 98-99, 123 *S. Ct.* at 1150-51, 155 *L. Ed.* 2d at 180-81, I conclude that the Court's holding in *Doe v. Poritz*, when applied to these circumstances, requires that we recognize that internet availability of information obtainable elsewhere is as "narrowly tailored" as necessary when compared to the substantial public interest that is implicated and, thus, is not violative of our state constitutional right of privacy.

C. Summary

As a result, I would conclude that we need not determine whether Paragraph 12 passes federal equal protection muster, because this constitutional amendment is a

device intended to bar the invalidation of any part of the Internet Registry Act on state constitutional grounds and is not triggered until an otherwise meritorious state constitutional argument is posed. Since I believe that our present jurisprudence does not permit a determination that the Internet Registry Act, as presently composed, violates any of the state constitutional guarantees asserted by plaintiffs, I disagree with my colleagues that it is necessary to determine the constitutionality of Paragraph 12. Instead, I would affirm the dismissal of the complaint by finding an absence of merit in the state constitutional arguments that Paragraph 12 was enacted to bar from the judiciary's scrutiny.

III

Although for reasons already expressed I would find it unnecessary to reach the issue, I respectfully disagree with my colleagues' determination that Paragraph 12 passes federal equal protection muster.

Like the state constitutional provision struck down by the Court in *Romer v. Evans*, 517 *U.S.* 620, 633, 116 *S.Ct.* 1620, 1628, 134 *L. Ed.* 2d 855, 866 (1996), in my view Paragraph 12 "is at once too narrow and too broad" in that it "identifies persons by a single trait and then denies them protection across the board." In this sense, as Justice Kennedy said in speaking for the Court in *Romer*:

> The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for [such a state constitutional amendment] is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine

> whether they are obnoxious to the constitutional provision."
>
> [*Romer, supra*, at 633, 116 *S. Ct.* at 1628, 134 *L. Ed.* 2d at 866 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 *U.S.* 32, 37-38, 48 *S. Ct.* 423, 425, 72 *L. Ed.* 770, 774 (1928)).]

Considering the unusual way in which Paragraph 12 seeks to insulate the Internet Registry Act from state constitutional scrutiny, and considering the narrow grouping of persons that Paragraph 12 purports to deprive of all state constitutional rights when asserted in this context, I would conclude that *Romer* compels a finding of Paragraph 12's unconstitutionality regardless of the fact that plaintiffs do not form a suspect class. *Accord Plyler v. Doe*, 457 *U.S.* 202, 102 *S. Ct.* 2382, 72 *L. Ed.* 2d 786 (1982) (holding that a state statute denying public education to illegal aliens violated equal protection even though the Court explicitly denied that illegal aliens constituted a suspect class or that education was a fundamental right); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 *U.S.* 432, 105 *S. Ct.* 3249, 87 *L. Ed.* 2d 313 (1985) (holding that a local zoning decision excluding group homes for the mentally retarded violated equal protection even though the Court explicitly denied that the mentally retarded constituted a suspect class).

I agree with my colleagues that the Legislature may make reasoned choices in "establish[ing] classifications that roughly approximate the nature of the problem perceived." *Plyler, supra*, 457 *U.S.* at 216, 102 *S. Ct.* at 2394, 72 *L. Ed.* 2d at 798-99. That analysis is applicable when examining whether the Internet Registry Act violates the equal protection clause. With regard to the Internet Registry Act, the Legislature is entitled to draw

distinctions in this area and I would conclude – had the issue been presented – that the choices made by the Legislature in enacting the Internet Registry Act bear a rational relation to the legitimate government interest in question. *Doe v. Poritz, supra*, 142 *N.J.* at 92. It does not follow, however, that because the Internet Registry Act may comport with the command of equal protection that so does Paragraph 12.

Paragraph 12, in my view, represents a per se violation of the equal protection clause because it does much more – it creates an unprecedented gap in the fabric of our state constitution by depriving plaintiffs of all existing and potential legal protections. In *Cruzan v. Director, Missouri Dep't of Health*, 497 *U.S.* 261, 300, 110 *S. Ct.* 2841, 2863, 111 *L. Ed.* 2d 224, 256 (1990) (concurring opinion), for example, Justice Scalia elegantly stated that "[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." If those sentiments remain true, then it follows that Paragraph 12 represents a glaring violation of the equal protection clause. Paragraph 12 violates the equal protection clause because it expressly purports to deprive only a small class of citizens of the protection of the state constitution for the impermissible purpose of insulating other legislation from judicial scrutiny by precluding the judiciary, when presented with a case or controversy, of determining whether particular legislation complies with the rights, contained in the state constitution, which were thought by our constitution's authors to be "natural and unalienable," *N.J. Const.* art. I, ¶ 1. If the issue was necessary for our determination, I would conclude that the State may not set apart a group of persons from the protection of all laws

because those persons were convicted of certain crimes prior to the adoption of Paragraph 12. The command of equal protection must extend to all within the State regardless of what a person may have done or may be inclined to do. Although the Legislature was entitled to distinguish among persons in enacting the Internet Registry Act, and although I would conclude, had it been raised, that the Internet Registry Act does not violate the commands of equal protection, I part company with my colleagues because I do not believe the Legislature may withhold from any of its citizens the inestimable right to the protection of our laws in the fashion reflected by Paragraph 12.[8] In short, in my view, the Internet Registry Act does possess a necessary link between its classification and objective, but Paragraph 12 was designed for the sole apparent purpose of disadvantaging a group of persons by depriving them of their state constitutional rights without "a rational relationship to an independent and legitimate legislative end." *Romer, supra*, 517 *U.S.* at 633, 116 *S. Ct.* at 1627, 134 *L. Ed.* 2d at 866.

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[8] The majority recognizes that the Internet Registry Act presently permits internet posting of only tier three and some tier two offenders, and that offenders continue to have the right to challenge their relevant tier classification for purposes of notification. In *Doe v. Poritz, supra*, 142 *N.J.* at 29-30, the Court held that the providing of community notification pursuant to prior enactments, including the tier classification which affected the scope of notification, must be subject to judicial review prior to notification because of the requirements of procedural due process and fundamental fairness. Since the state constitutional rights that drove this determination in *Doe v. Poritz* may no longer be asserted – now that this court has upheld Paragraph 12 – it follows that the procedural requirements presently in place continue to exist only through the grace of the Legislature and whatever protection the federal constitution may provide.

IV

For these reasons, I join with my colleagues in affirming the judgment entered in the trial court which dismissed plaintiffs' complaint.

PREPARED BY THE COURT

A.A., A.B., A.C., A.D., (by M.M., his natural parent), A.E., A.F., and A.G., (all ficticious initials), individually and or on behalf of all others similarly situated, Plaintiffs, v. State of New Jersey; James E. McGreevey, in his official capacity as Governor; Peter C. Harvey, in his official Capacity as Attorney General, State of New Jersey; and Joseph R. Fuentes, in his official capacity as Superintendent of the New Jersey State Police, Defendants.	: SUPERIOR COURT : OF NEW JERSEY : LAW DIVISION : DOCKET NO. MER L20-04 CIVIL ACTION ORDER

(Filed Dec. 20, 2004)

THIS MATTER having been opened to the court on October 8, 2004 by B. Stephan Finkel, Assistant Attorney General and Mary Beth Wood, Deputy Attorney General, counsel for defendants State of New Jersey, James E. McGreevey, Peter C. Harvey and Joseph Funtes, appearing, by notice of motion, filed on March 10, 2004, seeking dismissal of plaintiffs' complaint pursuant to *R.*4:6-2(e) for failure to state a claim upon which relief can be granted, in the presence of Michael Z. Buncher, Deputy Public Defender, Edward Barocas, Esquire, and Brian C. Neff,

Esquire, counsel for plaintiffs, in opposition and on cross motion for summary judgment, declaring Article IV, Section 7, Paragraph 12 of the New Jersey Constitution unconstitutional, and declaring the Internet Registry Act, N.J.S.A. 2C:7-12, *et seq.* unconstitutional, and enjoining the dissemination of information pursuant to the Act; and the court having considered oral argument and the papers submitted by the parties, as noted, and for good cause shown:

It is on this 20th day of December, 2004,

ORDERED that plaintiffs' complaint is hereby dismissed for failure to state a claim upon which relief can be granted, and it is further ORDERED that Article IV, Section 7, Paragraph 12 of the New Jersey Constitution is hereby declared constitutional; and it is further ORDERED that the Internet Registry Act, N.J.S.A. 2C:7-12, *et seq.* is hereby declared constitutional.

/s/ Andrew J. Smithson
ANDREW J. SMITHSON, J.S.C.

SUPERIOR COURT OF NEW JERSEY
MERCER VICINAGE

Andrew J. Smithson
Judge
(609) 571-4825
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[SEAL]

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Re: A.A. v. State of New Jersey, et als.
Docket No.: Mer L20-04
Decision

Dear Counsel:

This letter constitutes the court's decision regarding defendants' motion to dismiss for failure to state a claim upon which relief may be granted and plaintiffs' cross motion for summary judgment. This decision takes into account the full briefing of the issues and oral argument presented on October 8, 2004.

For the reasons that follow, defendants' motion to dismiss the complaint pursuant to Rule 4:6-2(e) is granted. Plaintiffs' cross motion for summary judgment is denied.

Background

Plaintiffs identify themselves as convicted sex offenders subject to the provisions of *N.J.S.A.* 2C:7-1 *et seq.*, the Registration and Community Notification Law (commonly referred to as "Megan's Law"). *See* plaintiff's Complaint at ¶¶ 18-25. Each plaintiff has been classified as a moderate or high-risk sex offender and, in accordance with Megan's Law, assigned to "Tier 2" or "Tier 3" notification status.

Historically, the New Jersey Legislature passed a Concurrent Resolution on June 30, 2000, providing that Article IV, Section 7 of the New Jersey constitution be amended to authorize the state Legislature to disclose to the general public "information pertaining to the identity, specific and general whereabouts, physical characteristics, and criminal history of persons found to have committed a sex offense." *N.J. Const.* Art. IV, § 7, ¶ 12. In the November 7, 2000 general election the citizens of this State overwhelmingly approved, by general referendum, an amendment to the New Jersey Constitution authorize the Legislature to enact new statutory provisions requiring

the disclosure of sex offender information to the general public.[1]

Accordingly, on July 23, 2001, the Sex Offender Internet Registry Act ("the Registry Act"), *N.J.S.A.* 2C:7-12, *et seq.*, was enacted. In October 2001, plaintiffs filed suit in the United States District Court for the District of New Jersey, challenging the Registry at and seeking a declaration that Art. IV, § 7, ¶ 12 of the New Jersey Constitution violated their rights under the United States Constitution.[2] Additionally, plaintiffs applied to the District Court for preliminary injunctive relief, seeking to prevent the State from implementing the Registry Act.

The Third Circuit of Appeals and the United States District Court for the District of New Jersey held that the Registry Act neither violates the Ex Post Facto or Double Jeopardy Clauses nor impermissibly infringes upon sex offender privacy rights under the United States Constitution. Plaintiffs then turned to the state forum by filing this action in January 2004, in order to litigate the noted claims under analogous provisions of the New Jersey Constitution.

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[1] *N.J. Const. Art. IV, § 7, ¶ 12* provides in full: Notwithstanding any other provision of this Constitution and irrespective of any right or interest in maintaining confidentiality, it shall be lawful for the Legislature to authorize by law the disclosure to the general public of information pertaining to the identity, specific and general whereabouts, physical characteristics and criminal history of persons found to have committed a sex offense. The scope, manner and format of the disclosure of such information shall be determined by or pursuant to the terms of the law authorizing the disclosure.

[2] Plaintiffs' Complaint at ¶ 16; *see also A.A. v. State of New Jersey*, 176 F.Supp. 2d 275 (D.N.J. 2001), *aff'd in part and rev'd in part*, 341 F.3d 206 (3d. Cir. 2003).

Defendants now move, in lieu of answer, for dismissal of plaintiffs' complaint pursuant to R. 4:6-2(e) for failure to state a claim upon which relief may be granted. Defendants contend that Art. IV, § 7, ¶ 12 stands as a bar to plaintiffs' claims that the sex offender Internet Registry Act violates their State constitutional rights and that, to successfully pursue their claims, plaintiffs must assert that Paragraph 12 offends the federal constitution, in that it violates their rights to equal protection under the law and imposes impermissible punishment in its retroactive application, in violation of the Ex Post Facto and Double Jeopardy Clauses.

Concurrently, plaintiffs move for an order granting summary judgment in their favor, declaring Article IV, § 7, ¶ 12 of the New Jersey Constitution unconstitutional; declaring the Registry Act, *N.J.S.A.* 2C:7-12, *et seq.* unconstitutional; and, enjoining the dissemination of information pursuant to the Registry Act.

Standard of Review

Dismissal pursuant to Rule 4:6-2(e)

The determinative test provides that if the pleadings, in and of themselves, fail to state a claim upon which relief may be granted, the complaint must be dismissed. Pursuant to R. 4:6-2(e), "dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted."[3] The court's inquiry therefore is confined to a consideration of the legal

[3] *Matter of Prudential Ins. Co. Litig.*, 282 N.J. Super. 256, 267-278 (Ch. Div. 1995) (citing *Rieder v. State Dept. of Trans.*, 221 N.J. Super. 547, 552 (App. Div. 1987).

sufficiency of the alleged facts apparently on the face of the challenged claim upon canvassing the complaint to determining whether or not a cause of action can be found within its four corners.[4]

For the reasons that follow, application of this standard mandates the dismissal of plaintiffs' complaint, as the law establishing the Registry Act cannot, in accordance with Article IV, § 7, ¶ 12, violate any other rights or interests under the New Jersey Constitution, and Paragraph 12 does not, as a matter of law, violate the Equal Protection Clause or impose punishment within the meaning of the federal constitution.

Summary Judgment

Concurrently, this court finds that summary judgment in favor of plaintiffs is not appropriate.

To grant a motion to enter summary judgment, the moving party must sustain the burden of establishing that there is no genuine issue of material fact in the case, and that there is an entitlement to judgment as a matter of law. *Judson v. Peoples Bank and Trust Company of Westfield*, 17 *N.J.* 67, 73, 110 A.2d 24 (1954). R. 4:46-2. A genuine issue of material fact must be a disputed issue of fact that is of a substantial nature, having substance and real existence. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523, 666 A.2d 146 (1995). In addition, courts must consider whether the competent evidential materials presented, when viewed in a light most favorable to the

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[4] *Van Natta Mechanical Corp. v. DiStaulo*, 277 N.J. Super. 175, 180 (App. Div. 1994).

non-moving party in consideration of applicable evidentiary standards, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. *Id.* The key in this analysis is for the court to determine whether there is sufficient disagreement to require submission to a jury or whether the factual circumstances are so one-sided that one party must prevail as a matter of law. *Brill*, at 533.

The record before this court discloses that summary judgment in plaintiffs' favor is inappropriate; necessarily so, as plaintiffs have failed to state a claim upon which relief can be granted. There simply is no issue of material fact presented in the record.

Analysis

Article IV, Section 7, Paragraph 12 of the New Jersey Constitution and the United States Constitution

Article IV, ¶ 7, ¶ 12 of the New Jersey Constitution does not violate the federal constitution.

As a threshold matter, to even consider plaintiffs' state law claims, plaintiffs must convince the court that Paragraph 12 should be struck down because it violates the Federal Constitution. In challenging a State constitutional provision, plaintiffs carry a high burden. As Justice O'Connor observed in a challenge to a Missouri constitutional provision on equal protection grounds:

> In this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people of Missouri as a whole. This constitutional provision reflects both the considered judgment of the state legislature

> that proposed it and that of the citizens of Missouri who voted for it. . . . "[W]e will not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational."[5]

See also State v. Muhammad 145 N.J. 23, 43 (1997) (according deference to the Victims' Rights Amendment to the New Jersey constitution "and the will of the electorate that overwhelmingly approved the constitutional amendment," in upholding the constitutionality of the victim impact statute.

In the judgment of the State Legislature as well as the people of New Jersey, ample justification existed for proposing and approving an amendment to the New Jersey Constitution to expressly establish the Legislature's authority to enact laws to provide the general public with access to identifying information pertaining to convicted sex offenders. No basis exists, in law or fact, that would allow this court to substitute its views for those expressly stated by the people of this state and by their elected representatives.

The Public Hearing before the Assembly Law and Public Safety Committee on June 1, 2000 sheds light on the impetus behind the constitutional amendment. *See* Assembly Concurrent Resolution No. 1, June 1, 2000. Assemblyman Joel M. Weingarten proclaimed: "What we

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[5] *Gregory v. Ashcroft*, 501 U.S. 452, 471, 111 S.Ct. 2395, 2406, 115 L.Ed. 2d 410 (1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 942-43, 59 L. Ed. 2d 171 (1979) (internal citations omitted).

are looking to do with this constitutional amendment is to see that, once and for all, the public's right to have knowledge about sexual predators is actually provided and that there is constitutional backing to allow such disclosure." *Id.* He went on to say that "Many of us, myself included, believe that, under both the New Jersey Constitution as well as the U.S. Constitution, notwithstanding the provisions of the 14th Amendment, this right exists today." *Id.* The Committee recognized that there are some in the 3rd circuit, as well as perhaps the State Supreme Court, who feel differently. As such, the Committee declared: "we want to make sure that there is no ambiguity as to the intent of this Legislature, and hopefully the administration, in terms of seeing that this information is information which rightly should be broadly disseminated." *Id.* With respect to the constitutional question, the Committee viewed the issue in the context of a balancing test, i.e. whether or not the privacy rights of individual sex offenders take precedence over the public's right to know. The Committee announced: "We strongly believe that the right to know and to protect the public, given the nature and the high probability of recidivism of many of these offenders, clearly is of greater import than the protection of the privacy rights of the individuals in question." *Id.*

Paragraph 12 Does Not Violate Plaintiffs' Equal Protection Rights Under the 14th Amendment of the U.S. Constitution

Plaintiffs equate Paragraph 12 to the legislation that the U.S. Supreme Court struck down on equal protection grounds in *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620,

134 L. Ed. 2d 855 (1996).[6] Plaintiffs argue that Paragraph 12, although it applies to a relatively narrow class of individuals, is nonetheless a wholesale stripping of their rights because through its operation they cannot rely on the New Jersey Constitution to challenge duly enacted sex offender community notification laws.

However, Paragraph 12 is a conduct-based provision that rationally serves a legitimate state interest. As the Washington Supreme Court indicated in *State v. Ward*, 869 P.2d 1062, 1077 (Wash. 1994), sex offenders have never been considered a *suspect* class. Heightened scrutiny does not apply if a suspect class is not implicated. Neither *Romer* itself, nor any subsequent Supreme Court equal protection decision, suggests that the standard applicable to an alleged violation of the Equal Protection Clause, which involves neither a suspect class nor a fundamental right, is anything other than the *rational basis test.* The United States Supreme Court generally defers to legislative judgment under "rational basis" review.[7] Paragraph 12 of the New Jersey Constitution is very much rationally related to a legitimate – even compelling – state interest in preventing future sex offenses. Sex offenses may be treated differently from other types of victimizing conduct, in consideration of the nature of the conduct itself (as compared to other criminal offenses) and the *demonstrated recidivism rates* for committing a new sex offense.

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[6] The U.S. Supreme Court invalidated, on equal protection grounds, a provision of the Colorado Constitution that divested the status-based class of homosexuals of any and all protection against virtually any type of governmental or private discrimination. The Colorado amendment was found to fail rational basis scrutiny.

[7] Lawrence H. Tribe, American Constitutional Law, ¶ 16-2, 16-3, (2d. ed. 1988).

Paragraph 12 Does Not Impose Criminal Punishment in Violation of the Ex Post Facto or Double Jeopardy Clauses of the U.S. Constitution

Plaintiffs charge that Paragraph 12 imposes a punitive sanction by purportedly "stripping them of the legal rights, protections, and remedies available to all other New Jersey residents" and "prohibiting their use of the same legal protections and remedies available to all other persons in New Jersey." Complaint, ¶¶ 54 and 58.

However, the express subordination of certain interests under the New Jersey Constitution in favor of a paramount interest, in this case a societal interest in preventing future sex offenses, is a valid, non-punitive *remedial* measure and does not constitute punishment under the applicable test set forth by the Supreme Court.

For purposes of either an ex post facto or double jeopardy analysis, the test for punishment is the same.[8] The U.S. Supreme Court confirmed the application of the *Hudson* test in *Smith v. Doe*, 538 U.S. 84 (2003), an ex post facto challenge to a law providing for general public access to identifying information about convicted sex offenders (specifically, Alaska's sex offender registration and internet notification law). The test that the court applied is two-fold.

First, the court must ascertain whether the legislature meant the statute to establish civil proceedings.

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[8] *See Myrie v. Commissioner, NJ Dept. of Corrections*, 267 F.3d 251, 255 (3d Cir. 2001) (applying the constitutional test for punishment set forth in *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997)).

Smith v. Doe, at 92. The Supreme Court stated "[a] conclusion that the legislature intended to punish would satisfy an ex post facto challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it." *Smith v. Doe*, at 92-93. Here, the New Jersey legislation authorizing the constitutional amendment included an "Interpretive Statement" for inclusion in the ballot question submitted to the voters, which provided that the disclosure of information concerning convicted sex offenders "would enable the public to take appropriate precautions to avoid or reduce the possibility of recidivist acts by such offenders." *N.J. Ass. Conc. Res.* 1, 209th Leg., 1st Ann. Sess. (2000). This statement is remedial in nature. It convincingly reflects the legislature's intent to enact a civil measure rather than a punitive one.

Second, the court must look at "whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Smith v. Doe*, at 92 (quoting *Hudson*, at 99). In the context of this evaluation "only the clearest proof will suffice." *Smith v. Doe*, at 92 (quoting *Hudson*, at 100).

The factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), guide the analysis of the effects of the measure at issue. *Smith v. Doe*, at 97. In application, the sex offender information disclosure laws authorized under Paragraph 12 have not historically been regarded as punishment the way incarceration,

incapacitation, and rehabilitation traditionally have.[9] Paragraph 12 does not impose an affirmative disability or restrain because the potential limitation on personal rights that might occur fails to rise to the level of a total deprivation of liberty and denial of fundamental rights that courts have found to constitute an affirmative disability or restraint. Paragraph 12 does not promote the traditional aims of punishment, because any criminal deterrent effect of Paragraph 12 is far outweighed by the civil deterrent effect of the avoidance of future victimization. Further, its application is not for retributive purposes but rather to capture pertinent information within a medium accessible to the general public.

This court is satisfied that the risk posed by recidivist sex offenders and the compelling public interest in preventing future sex offenses confirms the civil, remedial purpose and effect of the measures enabled under Paragraph 12. None of these considerations provide the clear proof required to transform a civil measure into a punitive one.

Sex Offender Internet Registry Act and the New Jersey Constitution

The Sex Offender Internet Registry Act, N.J.S.A. 2C:7-12, *et seq.*, does not violate the New Jersey Constitution.

Unless struck down as a violation of the U.S. Constitution, Paragraph 12 precludes a finding that the Registry

[9] Consider, the *Smith* court rejected the proffered analogy of such laws to colonial shaming punishments. *Id.* at 98.

Law violates the New Jersey Constitution. Plaintiffs fail to satisfy the substantial burden New Jersey courts require of a party challenging the constitutionality of a law. *See State v. Muhammad*, 145 N.J. 23, 41 (1996) declaring "whenever a challenge is raised to the constitutionality of a statute, there is a strong presumption that the statute is constitutional" and that "any act of the Legislature will not be ruled void unless its repugnancy to the Constitution is clear beyond a reasonable doubt."

The Act Does Not Impermissibly Infringe upon a State Constitutional Right to Privacy

Plaintiffs submit that the New Jersey Supreme Court has expressly held that citizens' home address, as well as the totality of information included in Megan's Law notifications, are constitutionally protected privacy information under the state constitution. *Doe v. Poritz*, 142 N.J. at 82-83. Plaintiffs further argue that, in conducting community notification, the government must utilize the "narrowest means" available to minimize infringement upon the recognized privacy interests. Id. at 90. While much of this is true, it is noted that plaintiffs stop short in their analysis of *Doe*.

Indeed, in *Doe v. Poritz*, the Court found privacy interests implicated under the state constitution in home addresses and the totality of the information disclosed to the public in Megan's Law notices. 142 N.J. at 82. The Court, nevertheless, held the "state interest in public disclosure substantially outweights plaintiff's interest in privacy." *Id.* at 88. The degree and scope of disclosure is carefully calibrated to the need for public disclosure: the risk of a further offense. As courts have recognized, "Megan's Law's fundamental purpose . . . *is* public disclosure." *A.A. v.*

New Jersey, 341 F.3d at 211 (quoting *Paul v. Farmer*, 227 F.3d 98, 106 (3d Cir. 2000). Given this fundamental purpose of making the information accessible to citizens who take affirmative steps to obtain it, the means chosen are sufficiently tailored to achieve that result.

The Act Does Not Impose Unconstitutional Punishment in Violation of the New Jersey Constitution

An analysis of case law confirms that the challenged Registry Act is remedial and not punitive. Pointedly, the U.S. Supreme Court in *Smith v. Doe* has found that Alaska's sex offender Internet Registry law does not impose punishment for ex post facto or double jeopardy purposes. 538 U.S. 84 (2003). In rejecting the registrants' argument that posting their information on the internet constituted punishment, the *Smith* Court stated: "[t]he purpose and principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation". 538 U.S. at 99.

In *Doe v. Poritz*, the Supreme Court of New Jersey rejected the notion that the State Constitution "should be interpreted in any way different from the Federal Constitution" in ex post facto, bill of attainder and double jeopardy challenges.[10] 142 N.J. at 42. The legislative findings and declarations of the Registry Act leave no doubt as to

[10] While the holdings of the U.S. Supreme Court are not controlling on state courts construing their own constitutions, they are nonetheless important guides on subjects that they squarely address. *State v. Hunt*, 91 N.J. 338, 363 (1982) (Handler, J., concurring).

the civil purpose and remedial intent of the internet registry law: "[p]ublic access to registry information is intended solely for the protection of the public, and is not intended to impose additional criminal punishment upon any convicted sex offender." *N.J.S.A.* 2C: 7-12.

This court finds little justification, much less the "clearest proof" required, to overcome the remedial intent underlying the Registry Law to conclude that it imposes criminal punishment.

Conclusion

Plaintiffs are convicted sex offenders who have had the full benefit of the procedural and substantive safeguards provided by our criminal justice system.

Through the process of amending our Constitution, the people of this State and their elected representatives have spoken forcefully on the issue of the disclosure of sexual offender information in order to protect the public from recidivistic predatory activity.

This court does not subscribe to the view, as repeatedly articulated by counsel for plaintiffs, that their convicted sex offender clients have been stripped of their rights and have been turned into "legal ghosts." Nonetheless, even if there were some merit to this position, it pales in comparison to the need for the protection mandated by the citizens of this State. For them, convicted sex offenders must not be allowed to hide their past. They must not be allowed to move about the general population with the potential of generating opportunities to prey on children and others in virtual ghost-like anonymity.

This court does not have a commission to substitute its views for those expressed by the people or the legislature. The function of the court is limited to the legal evaluation, analysis and decision making necessary to resolve the motions brought by the parties to this litigation. And, in that context, this court does not find any constitutional or other legal basis that would allow for any tampering with the clearly articulated will of the people.

Accordingly plaintiff's motion for summary judgment is denied; Article IV, § 7, ¶ 12 of the New Jersey Constitution and the Sex Offender Internet Registry Act remain in full force and effect; and, the disclosure of sex offender information to the general public consistent with the aforesaid constitutional amendment and enabling legislation will not be enjoined.

An order consistent with this decision has been prepared and filed by the court. A conformed copy is enclosed.

/s/ Andrew J. Smithson
Andrew J. Smithson, J.S.C.

SUPREME COURT OF NEW JERSEY
C-43 September Term 2006
59,521

A.A., A.B., A.C., A.D., (BY M.M., HIS NATURAL PARENT), A.E., A.F., and A.G. (ALL FICTITIOUS INITIALS), INDIVIDUALLY and ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs-Petitioners,

v.

ON PETITION FOR CERTIFICATION

STATE OF NEW JERSEY, RICHARD J. CODEY, IN HIS OFFICIAL CAPACITY AS ACTING GOVERNOR, STATE OF NEW JERSEY, PETER C. HARVEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL, STATE OF NEW JERSEY, and JOSEPH R. FUENTES, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE NEW JERSEY STATE POLICE,

Defendants-Respondents.

(Filed Sep. 08, 2006)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2153-04 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 6th day of September, 2006.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT